

# MILITARY JUSTICE NAVAL LAW REVIEW

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# **STOP THE MADNESS! IT'S TIME TO SIMPLIFY COURT-MARTIAL POST-TRIAL PROCESSING**

**Captain David E. Grogan, JAGC, USN\***

## **I. Introduction**

Post-trial processing of special and general courts-martial must change. The underlying rationale for the current procedures has long since vanished, and the procedures themselves are no longer relevant to the modern court-martial practice. As a result, post-trial processing needlessly absorbs scarce legal resources to comply with outdated and complex procedural requirements, results in avoidable legal errors which often require correction on appeal, and inures no substantive benefit to an accused other than the hope that the Government's noncompliance with the procedures (which have nothing to do with the guilt or innocence of the convicted service member) will result in reversible error or sentence relief.

Although current post-trial procedures will later be discussed in detail, the following synopsis of the procedures at issue will ensure a common understanding among those considering this article's proposals. After an accused is sentenced by a special or general court-martial, the record of trial is reviewed by the prosecutor (Trial Counsel) and Defense Counsel and authenticated by the Military Judge. The authenticated record of trial is then forwarded to the Convening Authority. When the accused is tried and convicted by a general court-martial or when a special court-martial sentence includes a bad conduct discharge or confinement for one year, the Convening Authority's lawyer (Staff Judge Advocate) or Legal Officer (non-lawyer) must prepare a recommendation as to what action the Convening Authority should take on the sentence awarded by the court-martial.<sup>1</sup> The Staff Judge Advocate or Legal

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\*Captain Grogan is a member of the U.S. Navy's Judge Advocate General's Corps. He currently serves as the Executive Assistant to the Judge Advocate General of the Navy. He earned a bachelor of business administration degree in accounting from the College of William & Mary in 1981, a doctor of jurisprudence degree from the University of Virginia School of Law in 1987, and a master of laws degree in international law from the George Washington University Law School in Washington, D.C., in 1998. Prior military assignments include service as Fleet Judge Advocate for U.S. Fleet Forces Command, Force Judge Advocate for U.S. Naval Forces Central Command/U.S. FIFTH Fleet, Staff Judge Advocate for Naval Network Warfare Command, and Commanding Officer of Region Legal Service Office Southeast. The views expressed herein are solely those of

Officer must take into account any matters submitted by the accused, generally in the form of a petition for clemency, in formulating the recommendation to the Convening Authority.

After considering the results of trial, the Staff Judge Advocate or Legal Officer's recommendation, if the case requires one, and any matters submitted by the accused, the Convening Authority may take action on the findings but must take action on the sentence. To take action on the sentence means to approve some or all of the sentence and order it executed (except any punitive discharge or dismissal), to disapprove the sentence in whole or in part, to mitigate the sentence, or to change a punishment to one of a different nature.<sup>2</sup> In essence, the reason the Convening Authority is required to take action on the sentence is so the Convening Authority can grant the accused clemency and reduce the sentence when the Convening Authority believes it is appropriate to do so. In reality, though, Convening Authorities rarely grant clemency because either they have entered into a pretrial agreement and given what amounts to clemency in advance in return for the accused's guilty pleas at trial, or because the accused did not plead guilty, and the Convening Authority believes the accused should live with the sentence ordered by the court-martial after a fair and impartial trial.

Why should warfighters care enough to endorse a change to post-trial processing procedures? Because unnecessary post-trial processing procedures waste manpower and money and distract Commanders (who serve as Convening Authorities) from focusing on their primary missions. Commanders certainly are concerned with maintaining good order and discipline because it is the fiber that holds a unit together and allows its members to work as a team to achieve common objectives. However, the reality is current post-trial processing procedures do not translate into improved good order and discipline and essentially provide Commanders with no benefit.

The seminal case dealing with post-trial processing procedures is *United States v. Moreno*.<sup>3</sup> In *Moreno*, the Court of Appeals for the Armed Forces reversed the conviction of Marine Corporal Javier A. Moreno, Jr., for rape because post-trial processing of the case took too long. The court found

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the author and do not reflect the official positions of the Department of Defense or the Department of the Navy.

<sup>1</sup> UCMJ art. 60(d) (2012); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1106(a) (2012) [hereinafter MCM].

<sup>2</sup> UCMJ art. 60 (2012); MCM, *supra* note 1, R.C.M. 1107.

<sup>3</sup> United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006); *see also* United States v. Foster, No. 200101955, 2009 CCA LEXIS 62 (N.M. Ct. Crim. App. Feb. 17, 2009) (unpublished) (holding that unreasonable post-trial delay, including 97 days to complete the Staff Judge Advocate's recommendation and 87 days for the Convening Authority to act, violated due process).

that the 490 days that had elapsed between the date the sentence was announced and the date the Convening Authority took action on the case (which involved a 746-page record of trial), coupled with the additional 1,198 days it took for Corporal Moreno's appeal to be heard, violated due process.<sup>4</sup>

Concerned with excessive delays in post-trial processing and appellate review, the Court in *Moreno* established a 120-day deadline from the date the sentence is announced for a Convening Authority to take action on a case. Failure to meet the deadline triggers a presumption of unreasonable delay and creates the possibility of relief for the accused on appeal. Although the Government may overcome the presumption by showing due diligence in taking action on the case, the entire scenario can be avoided by either eliminating the requirement for a Convening Authority to take action or significantly simplifying the post-trial requirement.

Instead of considering these approaches, Congress reacted to the *Moreno* decision and other Navy and Marine Corps cases affected by post-trial processing delays by establishing an independent panel to review the judge advocate requirements of the Department of the Navy. Section 506 of the National Defense Authorization Act for Fiscal Year 2010<sup>5</sup> directed an independent panel of five private U.S. citizens to review emergent operational law requirements of the Navy and Marine Corps; review the requirements to support the Office of Military Commissions and to support the disability evaluation system for members of the Armed Forces; review the judge advocate requirements of the Department of the Navy for the military justice mission, including the performance of the Navy and Marine Corps in providing legally sufficient post-trial processing of cases in general courts-martial and special courts-martial; and review the role of the Judge Advocate General of the Navy to determine whether additional authority for the Judge Advocate General over manpower policies and assignment of Navy and Marine Judge Advocates is warranted.<sup>6</sup>

In short, Congress focused on whether there are sufficient Navy and Marine Corps judge advocates to successfully perform existing post-trial processing procedures and not on whether those post-trial processing procedures make sense. Had Congress taken the latter approach and simplified post-trial

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<sup>4</sup> See *Moreno*, 63 M.J. at 133, 141, 144.

<sup>5</sup> National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 506, 123 Stat. 2190, 2278-79 (2009).

<sup>6</sup> *Id.* § 506(b)(2). Congress also directed the panel to review directives issued by the Navy and Marine Corps pertaining to jointly shared missions requiring legal support; review career patterns for Marine Judge Advocates; and review, evaluate and assess other matters as the panel considers appropriate. *Id.*

processing procedures, fewer judge advocate and other legal resources would have to be devoted to post-trial processing, allowing those resources to be channeled to the other judge advocate mission areas being studied by the panel. Furthermore, shorter, simpler post-trial processing procedures mean service members convicted of crimes and sentenced to punitive discharges spend less time on appellate leave and thus less time eligible for full medical and other benefits, including Commissary and Exchange privileges.<sup>7</sup>

So how can post-trial processing of courts-martial be changed so that the Department of Defense realizes these efficiencies without compromising the due process rights of convicted service members? There are two viable solutions, either of which would enhance the utility of courts-martial by making them easier for Commanders to use as a tool to promote good order and discipline. Both would also free up judge advocate and other legal resources to address other warfighter legal requirements, like operational law, and would preserve a clemency option for convicted service members without compromising due process. These solutions involve making the sentence adjudged by a court-martial self-executing and eliminating or streamlining a Convening Authority's post-trial clemency responsibilities. Before exploring these alternatives further, it is helpful to understand exactly what the current requirements are and the history behind them.

## **II. The Current Regime**

To fully grasp the need for change it is important to understand the relevant provisions of the Uniform Code of Military Justice (UCMJ) and the Rules for Courts-Martial (RCM) that govern post-trial processing of general and special courts-martial. The UCMJ is the statutory basis for military justice and the RCM are the implementing rules established by the President governing the conduct of all general and special courts-martial. Also important to the discussion is the underlying rationale for the relevant UCMJ and RCM provisions. Specifically, if the circumstances giving rise to the current regime have changed, current post-trial processing procedures need to change as well.

Accused service members facing trial by general or special court-martial may elect to be tried by Military Judge alone or by members, including,

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<sup>7</sup> See, e.g., U.S. MARINE CORPS, ORDER 1050.16A, APPELLATE LEAVE AWAITING PUNITIVE SEPARATION para. 20 (19 June 1998) (specifying that Marines on appellate leave retain all normal privileges, including commissary, exchange and medical privileges); U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 5815.3J, DEPARTMENT OF THE NAVY CLEMENCY AND PAROLE SYSTEMS para. 318 (12 June 2003) (stating that convicted service members who are pending completion of appellate review are still members of the naval service and are authorized medical care to the same extent as other service members).

if the accused is enlisted, enlisted members.<sup>8</sup> If the accused is found guilty of any of the charges by the court-martial, the court-martial will then determine an appropriate sentence.<sup>9</sup> After the sentence is announced at the conclusion of trial, the Trial Counsel promulgates the Report of Results of Trial to the Convening Authority, notifying the Convening Authority of the findings and the sentence awarded by the general or special court-martial.<sup>10</sup> The Report of Results of Trial typically includes a summarized version of each charge and specification and the accused's pleas and the court's findings thereto, the sentence awarded, and the terms of any pretrial agreement.<sup>11</sup> The Report of Results of Trial also typically indicates the applicability of certain administrative provisions which take effect by operation of law (e.g., automatic forfeiture provisions). Thus the Report of Results of Trial provides the Convening Authority with an executive summary of the findings and sentence of the court-martial, together with the ramifications of any pretrial agreement or applicable administrative provisions.

If the sentence adjudged by the court-martial includes a bad conduct discharge (or a dishonorable discharge or a dismissal), confinement in excess of six months, forfeiture of pay greater than two-thirds pay per month, or any forfeiture of pay for more than six months, or, if the court is a general court-martial, any other punishments that exceed what may be adjudged by a special court-martial, a verbatim record of trial is prepared.<sup>12</sup> If the sentence does not include punishments of this severity, a summarized record of trial may be prepared. In either case, the record of trial is provided to the Trial Counsel for review, with the Trial Counsel being responsible for any required corrections to make the record of trial accurate.<sup>13</sup> Similarly, the record of trial is provided to Defense Counsel, who may submit recommended corrections to the Trial Counsel, as well.<sup>14</sup> Once all corrections to the record of trial have been made, the record of trial is submitted to the Military Judge for authentication, which in essence is the Military Judge's certification that the record of trial accurately reports the trial proceedings.<sup>15</sup> The authenticated record of trial must then be

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<sup>8</sup> UCMJ art. 25; MCM, *supra* note 1, R.C.M. 903.

<sup>9</sup> UCMJ art. 51; MCM, *supra* note 1, R.C.M. 1001-1002. Even if the accused pleads guilty to a military judge alone, the service member may be sentenced by members. *See* MCM, *supra* note 1, R.C.M. 502(a)(2); DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 16-1 (6<sup>th</sup> ed. 2004).

<sup>10</sup> UCMJ art. 60(a); MCM, *supra* note 1, R.C.M. 1101(a).

<sup>11</sup> *See, e.g.*, U.S. DEP'T OF NAVY, JUDGE ADVOCATE GENERAL INSTR. 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL para. 0149, app. at A-1-q (26 June 2012) [hereinafter JAGMANUAL].

<sup>12</sup> UCMJ art. 54; MCM, *supra* note 1, R.C.M. 1103(b)(2)(B), (c)(1).

<sup>13</sup> MCM, *supra* note 1, R.C.M. 1103(i)(1)(A).

<sup>14</sup> *Id.* at 1103(i)(1)(B).

<sup>15</sup> UCMJ art. 54; MCM, *supra* note 1, R.C.M. 1104(a)(2)(A).

served on the accused, or, if the accused so elects, on the accused's Defense Counsel.<sup>16</sup>

The procedures up to this point are both reasonable and necessary. They ensure the Convening Authority is made aware immediately of the results of the court-martial he or she convened, including the impact on the sentence of any pretrial agreement entered into by the Convening Authority and the accused. The authentication procedures also ensure an accurate record of trial is prepared, preserving the right of the accused to a meaningful appeal of any claims of legal error pertaining to the findings and the sentence awarded by the court-martial. In short, the procedures to this point are necessary to the accused receiving a fair trial and are on par with civilian criminal courts.

This is where the similarity with civilian courts ends. In a civilian criminal court, a convicted person would begin to serve his sentence once it is announced by the court. In addition, the convicted person and his or her counsel would review the record of trial and decide whether or not to appeal the case to a higher court. In the military, the court-martial does not get the final word on the sentence—the Convening Authority does.<sup>17</sup> However, before the Convening Authority utters that final word (which is known as “the Convening Authority’s Action”<sup>18</sup>), the convicted service member and his or her Defense Counsel have the opportunity to submit matters to the Convening Authority in order to influence the Convening Authority’s decision on the case.<sup>19</sup>

More specifically, the convicted service member “may submit to the convening authority any matters that may reasonably tend to affect the convening authority’s decision whether to disapprove any findings of guilty or to approve the sentence.”<sup>20</sup> Such matters may be submitted for the Convening Authority’s consideration “within the later of 10 days after a copy of the authenticated record of trial or, if applicable, the recommendation of the staff judge advocate or legal officer, or an addendum to the recommendation containing new matter is served on the accused.”<sup>21</sup> The accused (i.e., convicted

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<sup>16</sup> MCM, *supra* note 1, R.C.M. 1104(b).

<sup>17</sup> Although the accused normally will start to serve any sentence to confinement as soon as confinement is adjudged by the court-martial, the remainder of the adjudged sentence (except those parts of the adjudged sentence which take effect by the operation of law (i.e., forfeitures of pay and reduction in grade)) will not take effect until ordered executed by proper authority. Proper authority is the Convening Authority, except in the case of a punitive discharge. See UCMJ art. 57; MCM, *supra* note 1, R.C.M. 1113; *see also* UCMJ art. 58a, 58b.

<sup>18</sup> UCMJ art. 60; MCM, *supra* note 1, R.C.M. 1107.

<sup>19</sup> MCM, *supra* note 1, R.C.M. 1105.

<sup>20</sup> *Id.* at 1105(b)(1); *see also* UCMJ art. 60(b).

<sup>21</sup> MCM, *supra* note 1, R.C.M. 1105(c); *see also* UCMJ art. 60(b).

service member) may request an additional 20 days to submit matters, which the Convening Authority may approve for good cause.<sup>22</sup>

In order to assist the Convening Authority in determining what action to take in the most serious court-martial cases, i.e., all general courts-martial and those special courts-martial where the sentence includes a bad conduct discharge or confinement for one year, the authenticated record is also provided to the Convening Authority's Staff Judge Advocate or Legal Officer for a recommendation.<sup>23</sup> The Staff Judge Advocate or Legal Officer must provide the Convening Authority with a copy of the Report of Results of Trial, a copy or summary of the pretrial agreement (the key terms of which are already summarized in the Report of Results of Trial), any recommendation for clemency by the sentencing authority (i.e., the Military Judge or the members), and the Staff Judge Advocate's or non-lawyer Legal Officer's recommendation.<sup>24</sup>

Significantly, the Staff Judge Advocate or Legal Officer is not required to examine the record of trial for legal errors,<sup>25</sup> which makes sense since the Legal Officer is not an attorney and would have difficulty identifying legal errors. Similarly, both Staff Judge Advocates and Legal Officers are unlikely to attempt to address all but the most obvious and egregious legal errors as courts-martial are conducted under the guiding hand of independent and experienced Military Judges and are subject to mandatory appellate review for essentially all serious cases. However, if the recommendation is being prepared by a Staff Judge Advocate vice a non-lawyer Legal Officer, when a convicted service member submits allegations of legal error to the Convening Authority prior to the Convening Authority taking action on the case or when otherwise deemed appropriate by the Staff Judge Advocate, the Staff Judge Advocate "shall state whether, in the staff judge advocate's opinion, corrective action on the findings or sentence should be taken."<sup>26</sup> No analysis or rationale for the opinion is required.<sup>27</sup> Finally, the Staff Judge Advocate or Legal Officer's recommendation may include other matters that the Staff Judge Advocate or Legal Officer deems appropriate, including matters outside the record.<sup>28</sup>

After the Staff Judge Advocate or Legal Officer signs the recommendation, a copy must be provided to the Defense Counsel, who may

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<sup>22</sup> UCMJ art. 60(b)(2); MCM, *supra* note 1, R.C.M. 1105(c).

<sup>23</sup> UCMJ art. 60(d); MCM, *supra* note 1, R.C.M. 1106(a).

<sup>24</sup> MCM, *supra* note 1, R.C.M. 1106(d)(3).

<sup>25</sup> *Id.* at 1106(d)(4).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 1106(d)(5).

submit corrections or a rebuttal to any matter in the recommendation believed to be erroneous, inadequate or misleading.<sup>29</sup> Comments on any other matter are also permitted.<sup>30</sup> Such matters must be submitted within 10 days of service of the authenticated record of trial or receipt of the recommendation, whichever is later.<sup>31</sup> A 20-day extension may be granted for good cause shown.<sup>32</sup> The Staff Judge Advocate or Legal Officer may supplement his or her original recommendation based on matters submitted by the convicted service member or Defense Counsel; however, if the supplemental recommendation includes new matters, the convicted service member and Defense Counsel must again be given 10 days to respond.<sup>33</sup>

Once all comments have been submitted by the convicted service member or Defense Counsel and/or all associated time periods for submission have expired, any required Staff Judge Advocate or Legal Officer's recommendation and any associated supplement, together with any matters submitted by the convicted service member or Defense Counsel, are provided to the Convening Authority for "action on the sentence and, in the discretion of the Convening Authority, the findings, unless it is impracticable."<sup>34</sup> "Action on the sentence" means that the Convening Authority may approve the sentence and order it executed (except for a punitive discharge or dismissal, which are not executed until all appeals are exhausted) or for any or no reason at all disapprove the sentence in whole or in part, mitigate the sentence, or change an adjudged punishment to one of a different nature as long as the severity of the punishment is not increased.<sup>35</sup> The requirement for the Convening Authority to take action on the sentence affords the convicted service member an opportunity to seek clemency from the Convening Authority, although the Convening Authority can reduce the sentence even without a request from the convicted service member if the Convening Authority believes such action is warranted.<sup>36</sup>

While the Convening Authority must take action on the adjudged sentence, the Convening Authority may, but is not required to, take action on the findings of the court-martial.<sup>37</sup> "Action on the findings" means that the

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<sup>29</sup> *Id.* at 1106(f)(4).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 1106(f)(5).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1106(f)(7).

<sup>34</sup> *Id.* at 1107(a); *see also* UCMJ art. 60(c)(1).

<sup>35</sup> UCMJ art. 60(c)(2); MCM, *supra* note 1, R.C.M. 1107(d)(1).

<sup>36</sup> See UCMJ art. 60(c)(1)-(2); *see also* MCM, *supra* note 1, R.C.M. 1107(b)(1)(discussion) (the Convening Authority may lessen the impact of the findings or the sentence on the command or the accused "in the interests of justice, discipline, mission requirements, *clemency*, and other appropriate reasons" (emphasis added)).

<sup>37</sup> UCMJ art. 60(c)(3); MCM, *supra* note 1, R.C.M. 1107(c).

Convening Authority may, in his or her sole discretion, set aside any finding of guilty or commute a finding of guilty to a lesser included offense.<sup>38</sup> If the Convening Authority sets aside a finding of guilty, the charge or specification may be dismissed with prejudice (meaning the accused cannot be retried on that charge or specification) or without prejudice (meaning a rehearing on the charge or specification is permissible).<sup>39</sup> The Convening Authority may not take any action with respect to a finding of “not guilty” to a charge or specification.<sup>40</sup>

Taking action on the findings and/or the sentence is highly technical and an area ripe for creating errors which result in cases being sent back by appellate courts for corrective action. In the most egregious cases, convictions may be overturned or sentences reduced.<sup>41</sup> The travesty is these errors generally have nothing to do with the convicted service member receiving a fair trial – they relate solely to noncompliance with the complex post-trial procedural requirements set forth in the preceding paragraphs and to mistakes made in putting together the Convening Authority’s action. Appendix 16 of the Manual for Courts-Martial attempts to “simplify” drafting the Convening Authority’s action by setting forth model language.<sup>42</sup> In cases where the findings are not affected by Convening Authority’s action, there are fourteen different forms for initial action on a court-martial sentence.<sup>43</sup> Some contain variations in language depending upon the circumstances. There are an additional six forms to use when the court-martial findings are affected, three forms for the suspension of the automatic reduction in paygrade under Article 58a of the UCMJ,<sup>44</sup> and seven forms for cases in which the accused is an officer.<sup>45</sup>

Once the Convening Authority completes the action, the record of trial is ready for review. Cases that have approved sentences extending to death or including a dismissal or punitive discharge, or confinement of one year or more, are entitled to automatic appeal to the Army, Air Force, Navy-Marine Corps or Coast Guard Court of Criminal Appeals.<sup>46</sup> For general courts-martial where the sentence does not rise to this level and the convicted service member has not

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<sup>38</sup> UCMJ art. 60(c)(3); MCM, *supra* note 1, R.C.M. 1107(c).

<sup>39</sup> See generally UCMJ art. 60(e); MCM, *supra* note 1, R.C.M. 1107(e)-(f).

<sup>40</sup> UCMJ art. 60(e).

<sup>41</sup> See cases cited *infra* note 101.

<sup>42</sup> MCM, *supra* note 1, app. 16.

<sup>43</sup> *Id.*

<sup>44</sup> See UCMJ art. 58a (specifying that when the sentence of a court-martial as approved by the Convening Authority includes a dishonorable or bad-conduct discharge, confinement, or hard labor without confinement, an enlisted member above the pay grade of E-1 is reduced to pay grade E-1 effective upon the date the Convening Authority approves the sentence).

<sup>45</sup> MCM, *supra* note 1, app. 16.

<sup>46</sup> See UCMJ art. 66; MCM, *supra* note 1, R.C.M. 1201(a). The convicted service member may waive his or her right to appeal except where the approved sentence extends to death. UCMJ art. 61; MCM, *supra* note 1, R.C.M. 1110(a).

waived appellate review, the Service Judge Advocate General examines the record of trial to determine if any of the findings or sentence is unsupported in law or if a reassessment of the sentence is appropriate.<sup>47</sup> If so, the Service Judge Advocate General may modify or set aside the findings or sentence or both.<sup>48</sup> The Service Judge Advocate General may also refer the case to the appropriate Court of Criminal Appeals.<sup>49</sup> All other general and special court-martial cases where there is a finding of guilty, including those cases otherwise entitled to review by the Service Courts of Criminal Appeals except that the appeal has been waived or withdrawn, are reviewed by a judge advocate.<sup>50</sup> The reviewing judge advocate is responsible for concluding whether the court-martial had jurisdiction over the accused, whether the offenses for which there was an approved finding of guilty stated an offense, and whether the sentence was legal.<sup>51</sup> The reviewing judge advocate must also respond to allegations of legal error made by the accused and recommend any required corrective action to the appropriate General Court-Martial Convening Authority.<sup>52</sup>

Allowing for the winnowing of cases to lesser levels of review based on the seriousness of the forum and the sentence and the automatic nature of certain appeals, the appellate review of general and special courts-martial is roughly equivalent to the civilian justice system. It is the post-trial processing procedures that fall between authentication of the record of trial by the Military Judge and appellate review that merit both scrutiny and revision. Before considering specific revisions to those post-trial processing procedures, it is helpful to understand their genesis and the purposes they were intended to serve.

### **III. The Historical Context**

Military commanders have had the authority to grant clemency to service members convicted by courts-martial since the Revolutionary War.<sup>53</sup> Beginning with the American Articles of War of 1775, generals and regimental commanders had the authority to pardon or mitigate sentences handed down by courts-martial.<sup>54</sup> The rules specifically applicable to the Navy developed differently, initially explicitly giving the power to the Commander in Chief of

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<sup>47</sup> UCMJ art. 69; MCM, *supra* note 1, R.C.M. 1201(b).

<sup>48</sup> UCMJ art. 69; MCM, *supra* note 1, R.C.M. 1201(b).

<sup>49</sup> UCMJ art. 69; MCM, *supra* note 1, R.C.M. 1201(b).

<sup>50</sup> UCMJ art. 64; MCM *supra* note 1, R.C.M. 1112.

<sup>51</sup> UCMJ art. 64; MCM, *supra* note 1, R.C.M. 1112.

<sup>52</sup> UCMJ art. 64; MCM, *supra* note 1, R.C.M. 1112.

<sup>53</sup> See Lieutenant Michael J. Marinello, *Convening Authority Clemency: Is It Really An Accused's Best Chance Of Relief?*, 54 NAVAL L. REV. 169, 173-74 (2007) (providing an excellent exposition of the history of the clemency power in U.S. military justice).

<sup>54</sup> *Id.* at 173-174.

the Fleet to grant clemency in capital cases.<sup>55</sup> However, the Navy rules also required the American Articles of War to be posted on each ship and read to the ship's company once a month, creating an internal inconsistency regarding the controlling authority for the clemency power.<sup>56</sup> In 1800, the Articles for the Government of the Navy were revised to make it clear that they, and not the Articles of War, applied to the Navy and that the power to grant clemency was extended to all Convening Authorities in all court-martial cases.<sup>57</sup> Significantly, though, the Convening Authority's clemency power was restricted to courts-martial conducted outside the United States.<sup>58</sup> For Navy courts conducted inside the United States, the clemency power was vested in the President of the United States.<sup>59</sup> This distinction remained in effect until 1918.<sup>60</sup>

The court-martial practice during World Wars I and II directly led to today's post-trial processing procedures. As millions of men swelled the ranks of the military, the military justice caseload swelled, as well. During World War II alone, over 2 million courts-martial were held.<sup>61</sup> Unfathomable in light of today's shrinking military justice case loads, the Army held 66,993 general courts-martial during the war while the Navy added 53,712.<sup>62</sup> Courts-martial, which did not require participation by lawyers as prosecutors, defense attorneys or judges, often handed down harsh sentences, leaving it up to Commanders to exercise their clemency power to make the punishment fit the crime.<sup>63</sup> At the end of the war, at least 45,000 military members were still serving sentences of confinement awarded by courts-martial, and the number was likely much higher.<sup>64</sup> The public outcry to reform the military justice system was significant.<sup>65</sup>

The War Department Advisory Committee on Military Justice, which was appointed on 25 March 1946 to study the administration of military justice in the Army and the Army's court-martial system, noted "[t]he sentences originally imposed [by courts-martial] were frequently excessively severe and

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<sup>55</sup> *Id.* at 174.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 175.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Captain John T. Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39, 39 (1972).

<sup>62</sup> *Id.* at 39 n.3.

<sup>63</sup> See *Id.* at 41.

<sup>64</sup> *Id.* at 40-41, 41 n.5.

<sup>65</sup> Marinello, *supra* note 53, at 181; Willis, *supra* note 61, at 39. See also Major Lisa L. Turner, *The Articles of War and the UCMJ*, AEROSPACE POWER J. (Fall 2000), available at <http://www.airpower.maxwell.af.mil/airchronicles/apj/apj00/fal00/turner.htm>.

sometimes fantastically so.”<sup>66</sup> The report further notes that “[n]ot infrequently the members of the court were given to understand that in case of a conviction they should impose the maximum sentence provided in the statute so that the general, who had no power to increase a sentence, might fix it to suit his own ideas.”<sup>67</sup> This led the Advisory Committee to recommend that court-martial members should be appointed by the independent Judge Advocate General’s Department, who would also serve as the post-trial reviewing authority.<sup>68</sup> Significantly, though, the Advisory Committee also recommended that the Commander who referred the case for trial retain the power to mitigate, suspend or set aside the sentence.<sup>69</sup>

In 1946, the Navy commissioned a similar study of the Navy’s general court-martial practice during the war.<sup>70</sup> After reviewing the origins of U.S. military court-martial practice and exploring the relationship between the exercise of command and discipline, the General Court-Martial Sentence Review Board dissected the Navy’s general court-martial practice and made detailed recommendations with a view toward demonstrating the need for comprehensive reform.<sup>71</sup> Section VII of the Board’s report addressed post-trial review of courts-martial by Convening Authorities.<sup>72</sup> Recognizing that at the time there were no appellate courts to review court-martial cases, the Board acknowledged the importance of the Convening Authority’s review and action on the findings and sentence, at least in theory, as a substantial protection to the accused.<sup>73</sup> The Convening Authority could correct errors in the findings, reduce excessive sentences, and grant clemency to the accused even when the sentence was not excessive.<sup>74</sup>

In practice, however, the General Court-Martial Sentence Review Board found flaws in the execution of the Convening Authority’s review and

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<sup>66</sup> WAR DEP’T ADVISORY COMM. ON MILITARY JUSTICE, REPORT OF WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE TO THE HONORABLE SECRETARY OF WAR, at 4 (13 Dec. 1946) available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/report-war-dept-advisory-committee.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/report-war-dept-advisory-committee.pdf) [hereinafter REPORT OF WAR DEPARTMENT ADVISORY COMMITTEE].

<sup>67</sup> *Id.* at 7.

<sup>68</sup> *Id.* at 8-9.

<sup>69</sup> *Id.* at 10.

<sup>70</sup> GENERAL COURT-MARTIAL SENTENCE REV. BOARD., REPORT AND RECOMMENDATIONS OF THE GENERAL COURT-MARTIAL SENTENCE REVIEW BOARD (1947) available at [http://www.loc.gov/rr/frd/Military\\_Law/Morgan-Papers/Vol-III\\_general-court-martial-sentences-review-board.pdf](http://www.loc.gov/rr/frd/Military_Law/Morgan-Papers/Vol-III_general-court-martial-sentences-review-board.pdf) [hereinafter GENERAL COURT-MARTIAL SENTENCE REVIEW BOARD REPORT].

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 189-206A.

<sup>73</sup> *Id.* at 191.

<sup>74</sup> *Id.*

action.<sup>75</sup> Noting that while there was no evidence in the over 2,000 general court-martial cases reviewed by the Board that Convening Authorities had acted unfairly, the Board observed that it is “humanly impossible” for the person who convenes a court, “no matter how high his purpose, to dissociate himself from his prior actions and opinions on a particular case and to view it later as though he were seeing it for the first time.”<sup>76</sup> The Board found the same defect with respect to requiring that the case be reviewed by a Legal Officer for his opinion, noting that the Legal Officer was usually involved with the case since its inception and had likely drafted the charges against the accused and recommended trial in the first place.<sup>77</sup> Thus it would be hard for either the Convening Authority or the Legal Officer to do an objective review of the case.

The Board also noted that Navy general courts-martial often imposed excessively harsh sentences, just as the War Department Advisory Committee on Military Justice found for the Army.<sup>78</sup> The Board stated:

The practical result of the present system is that the reviewing authority, rather than the court, fixes the sentence. . . . [I]n the vast majority of cases the court merely fixes a maximum limit to the sentence, and the sentence is actually set by the reviewing authority, within that maximum. The clemency extended by the reviewing authority in most cases consists merely in reducing the sentence to something approaching what it should have been in the first place.<sup>79</sup>

The Board then considered two suggestions for modifying the initial review. The first option preserved the requirement that the Commander take action on the findings and sentence; however, the decision would be taken by the Commander one echelon higher.<sup>80</sup> The second option abolished the requirement for Commander action and made the court-martial sentence self-executing subject only to higher departmental level review.<sup>81</sup> Ultimately, the Board recommended the latter, preserving the Commander’s ability to refer a case to a court-martial, but ceding subsequent control to the court-martial and higher authority.<sup>82</sup> This would, presumably, encourage the court-martial to

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<sup>75</sup> *Id.* at 192.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 193.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 195.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 206.

render a sentence deemed appropriate for any findings of guilty.<sup>83</sup> Interestingly, this was the same approach recommended at the end of World War I by the Acting Judge Advocate General of the Army, Brigadier General Samuel T. Ansell, but which was never enacted into law.<sup>84</sup>

These reports and other reports like them<sup>85</sup> set the stage for adoption of the Uniform Code of Military Justice on 5 May 1950.<sup>86</sup> The UCMJ, which replaced the Articles of War for the Army and the Articles for the Government of the Navy, brought about radical revisions in the post-trial processing of courts-martial, to include the establishment of boards of review under the authority of the Service Judge Advocates General<sup>87</sup> and a Court of Military Appeals with civilian judges<sup>88</sup> to hear appeals from certain special and general courts-martial; however, it left intact the requirement for Convening Authorities to take action on the findings and the sentences of special and general courts-martial.<sup>89</sup>

Under the UCMJ of 1950, the Convening Authority was permitted to “approve only such findings of guilty, and the sentence or such part or amount of the sentence, as he finds correct in law and fact and as he in his discretion determines should be approved.”<sup>90</sup> This limitation preserved *both* historical functions of the Convening Authority’s action – as a quasi-appellate review responsible for evaluating the case for legal error and as an opportunity to consider clemency for the convicted service member. To enable the Convening Authority to accomplish this mandate, the Convening Authority was required to obtain a written legal opinion from his Staff Judge Advocate or Legal Officer before taking action on general courts-martial.<sup>91</sup> Over time, as court decisions required the inclusion of additional information in the Staff Judge Advocate or Legal Officer’s recommendation, the recommendations became lengthy,

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<sup>83</sup> *Id.* at 203.

<sup>84</sup> Marinello, *supra* note 53, at 177-180.

<sup>85</sup> See, e.g., BALLENTINE COMM., ORGANIZATION, METHODS AND PROCEDURES OF NAVAL COURTS (24 Sep. 1943) available at [http://www.loc.gov/rr/frd/Military\\_Law/Morgan-Papers/Vol-III\\_Ballantine-reports.pdf](http://www.loc.gov/rr/frd/Military_Law/Morgan-Papers/Vol-III_Ballantine-reports.pdf); BALLENTINE COMM., REPORT OF BOARD CONVENED BY PRECEPT OF THE SECRETARY OF THE NAVY DATED NOVEMBER 15, 1945 (24 Apr. 1946) available at [http://www.loc.gov/rr/frd/Military\\_Law/Morgan-Papers/Vol-III\\_Ballantine-reports.pdf](http://www.loc.gov/rr/frd/Military_Law/Morgan-Papers/Vol-III_Ballantine-reports.pdf); MCGUIRE COMMITTEE, REPORT TO THE SECRETARY OF THE NAVY ON THE ARTICLES FOR THE GOVERNMENT OF THE NAVY AND COURTS-MARTIAL PROCEDURE (21 Nov. 1945) available at [http://www.loc.gov/rr/frd/Military\\_Law/Morgan-Papers/Vol-III\\_McGuire-report.pdf](http://www.loc.gov/rr/frd/Military_Law/Morgan-Papers/Vol-III_McGuire-report.pdf).

<sup>86</sup> UCMJ, Pub. L. No. 81-506, 64 Stat. 107 (1950).

<sup>87</sup> UCMJ, Art. 66 (1950).

<sup>88</sup> UCMJ, Art. 67 (1950).

<sup>89</sup> UCMJ, Art. 60, 64 (1950).

<sup>90</sup> UCMJ, Art. 64 (1950).

<sup>91</sup> UCMJ, Art. 61 (1950).

complex, unwieldy, and of marginal benefit to the Convening Authority.<sup>92</sup> Worse yet, the recommendations became a source of appellate litigation even when the underlying court-martial was error free.<sup>93</sup>

Two subsequent amendments to the UCMJ addressed these issues, either directly or indirectly, and essentially brought the UCMJ to where it stands today in terms of substantive post-trial review procedures. First, the Military Justice Act of 1968 professionalized the courtroom by requiring independent military lawyers to serve as Military Judges, Trial Counsel, and Defense Counsel for most cases.<sup>94</sup> When coupled with the previous revisions that established appellate review for serious court-martial cases, this eliminated the need for a Convening Authority to serve as a quasi-appellate review authority. Congress formally recognized this development in 1983 with the enactment of the Military Justice Act of 1983,<sup>95</sup> which eliminated the requirement that Convening Authorities approve only so much of the findings or sentence as was correct in law and fact, thus focusing the Convening Authority's action on exercising the command prerogatives of good order and discipline and clemency.<sup>96</sup>

Consistent with this change in focus, the right of convicted service members to submit matters for the Convening Authority to consider in deciding whether to exercise his prerogative, and the requirements for the Staff Judge Advocate or Legal Officer's recommendation, were also elaborated.<sup>97</sup> Convicted service members were prescribed specific timelines within which they could submit matters for the Convening Authority to consider and respond to the contents of the Staff Judge Advocate or Legal Officer's recommendation.<sup>98</sup> In addition, the requirement for the Staff Judge Advocate or Legal Officer to review the record of trial for legal error was removed and the contents of the Staff Judge Advocate or Legal Officer's recommendation were spelled out with specificity in what is now RCM 1106.<sup>99</sup> However, pursuant to the President's direction through RCM 1106, if the convicted service member raised legal errors in the matters submitted to the Convening Authority for consideration, and if the recommendation was being prepared by a Staff Judge

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<sup>92</sup> See S. Rep. No. 98-53, at 7 (1983); H.R. Rep. No. 98-549, at 14 (1983).

<sup>93</sup> See S. Rep. No. 98-53, at 7 (1983); H.R. Rep. No. 98-549, at 14 (1983).

<sup>94</sup> The Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335, 1335-37 (1968) (specifically, amendments to UCMJ, Articles 16, 19, 26 and 27 (1950)).

<sup>95</sup> The Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (1983).

<sup>96</sup> S. Rep. No. 98-53, at 19 (1983); Military Justice Act of 1983 § 5(a)(1), 97 Stat. at 1395-1397 (amending UCMJ, Article 60 (1950), to address action by the convening authority, which was previously covered in UCMJ, Article 64 (1950)).

<sup>97</sup> Military Justice Act § 5(a)(1), 97 Stat. at 1395-97 (amending UCMJ, Article 60 (1950)).

<sup>98</sup> *Id.*

<sup>99</sup> See MCM, *supra* note 1, R.C.M. 1106(d).

Advocate as opposed to a Legal Officer, the Staff Judge Advocate was required to respond to the allegations, as well as any *prima facie* legal errors discovered when putting together his or her recommendation.<sup>100</sup>

Thirty years have passed since the 1983 amendments and in some sense, post-trial procedures have come full circle. Although *United States v. Moreno* is perhaps an extreme example, post trial procedures have once again become a source of appellate litigation unrelated to the issue of guilt or innocence at trial.<sup>101</sup> Even where the allegations of error result in no corrective

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<sup>100</sup> *Id.*

<sup>101</sup> See, e.g., United States v. Stefan, 69 M.J. 256, 258-59 (C.A.A.F. 2010) (Chief of Military Justice disqualified from preparing the addendum to the Staff Judge Advocate's recommendation); United States v. Mullins, 69 M.J. 113, 118-19 (C.A.A.F. 2010), (court finds no prejudice to Appellant in 360-day period from sentencing to Convening Authority's action); United States v. Beasley, No. 201200293, 2012 CCA LEXIS 672, \*2-4 (N.M. Ct. Crim. App. Oct. 31, 2012) (unpublished) (Convening Authority's action incorrectly states action taken within 120 days after the completion of trial); United States v. Clarke, No. 201200118, 2012 CCA LEXIS 599, \*2 (N.M. Ct. Crim. App. July 31, 2012) (court-martial order fails to reflect military judge dismissed four specifications); United States v. Urbaez, No. 201000199, 2010 CCA LEXIS 485, \*2-3 (N.M. Ct. Crim. App. Dec. 28, 2010) (unpublished) (Convening Authority's action failed to suspend a portion of the adjudged confinement as required by the pretrial agreement); United States v. Edwards, No. 200602314, 2010 CCA LEXIS 482, \*5 (N.M. Ct. Crim. App. Dec. 21, 2010) (unpublished) (case "plagued by post-trial legal error, and the majority of the delays in the case are directly attributable to the need to correct the post-trial errors"); United States v. Cyran, No. 201000512, 2010 CCA LEXIS 479, \*3 (N.M. Ct. Crim. App. Dec. 21, 2010) (unpublished) (Convening Authority's action ambiguous on its face and approved forfeitures that exceeded the maximum sum allowable); United States v. Miller, No. 201000483, 2010 CCA LEXIS 599, \*2 (N.M. Ct. Crim. App. Dec. 9, 2010) (unpublished) (Convening Authority's action wrongly states that accused plead guilty to Specification 1 to wrongful introduction of cocaine onto a military installation vice wrongful use of cocaine); United States v. Morales, No. 201000057, 2010 CCA LEXIS 752, \*2-3 (N.M. Ct. Crim. App. Nov. 23, 2010) (unpublished) (Convening Authority's action set aside because the Report of Results of Trial, incorporated and adopted in the Staff Judge Advocate's recommendation, failed to reflect the Military Judge's dismissal of Specification 1 under Charge 2); United States v. Chandler, No. 201000404, 2010 CCA LEXIS 584, \*1-2 (N.M. Ct. Crim. App. Nov. 16, 2010) (unpublished) (Convening Authority's action erroneously orders execution of bad conduct discharge); United States v. Harkcom, No. S31904, 2012 CCA LEXIS 403, \*1-2 (A.F. Ct. Crim. App. Oct. 18, 2012) (unpublished) (Convening Authority approves forfeiture greater than adjudged amount); United States v. Smit, No. S32040, 2012 CCA LEXIS 379, \*2 (A.F. Ct. Crim. App. Oct. 4, 2012) (unpublished) (Convening Authority erroneously approves sentenced adjudged without giving effect to pretrial agreement); United States v. Astacio-Pena, No. 37401, 2010 CCA LEXIS 180, \*10-12 (A.F. Ct. Crim. App. Apr. 30, 2010) (unpublished) (Staff Judge Advocate's recommendation failed to fully note Appellant's foreign and combat service); United States v. Flores, 69 M.J. 651, 657 (A.F. Ct. Crim. App. 2010) (Air Force Court of Criminal Appeals raises *sua sponte* that the Staff Judge Advocate's recommendation incorrectly reported to the Convening Authority the maximum possible sentence in the case); United States v. Dodson, No. 20090378, 2012 CCA LEXIS 260, \*4-10 (A. Ct. Crim. App. July 16, 2012) (unpublished) (unreasonable post-trial delay of 550 days from sentencing to Convening Authority's action results in sentence relief); United States v. Valencia, No. 20090381, 2012 CCA LEXIS 378, \*3-4 (A. Ct. Crim. App. Sep. 28, 2012) (unpublished) (Defense counsel's failure to reengage his client on clemency matters after a lengthy delay in the authentication of the record of trial resulted in a set aside of the Convening Authority's action); United States v. Hudgins, 69 M.J. 630, 631 (A. Ct. Crim. App. 2010) (Army Court of Criminal

action, they needlessly consume appellate court, Convening Authority, and/or Staff Judge Advocate time to address. And, while post-trial processing was not cited as a contributing factor to deployed Commanders engaged in combat operations no longer using courts-martial as a viable disciplinary tool,<sup>102</sup> complex post-trial requirements certainly do not facilitate the use of courts-martial in support of good order and discipline in an area of conflict or anywhere else for that matter.

#### **IV. Proposing a Simpler Way**

Any proposed changes to post-trial processing must be assessed in light of three competing interests. First, if any such changes are to be considered acceptable by the Defense Bar, they cannot be seen as eliminating a substantive right of an accused. Second, for the changes to be acceptable to military Commanders, the changes must not be perceived as compromising the meaningful exercise of the Commander's lawful prerogative over good order and discipline within his or her command. Finally, the resulting system must work equally well in both peacetime and war.

With regard to the Defense Bar's interests, the requirements for a Staff Judge Advocate or Legal Officer's recommendation and a Convening Authority's action are unique to military justice—there are no comparable requirements in U.S. civilian jurisprudence. In the civilian sector, a convicted individual must seek clemency from a State's clemency and parole board or, if convicted in the Federal courts, from the President through the Department of Justice Office of the U.S. Pardon Attorney.<sup>103</sup> Once a case has been brought to

Appeals raises *sua sponte* that Staff Judge Advocate's review is erroneously signed by the Deputy Staff Judge Advocate vice the Staff Judge Advocate); United States v. Ney, 68 M.J. 613, 616-17 (A. Ct. Crim. App. 2010) (addendum to Staff Judge Advocate's recommendation incorrectly addressed Appellant's assertion of legal error and post-trial processing took 174 days); United States v. Gilliam, No. 20090907, 2010 CCA LEXIS 392, \*4-5 (A. Ct. Crim. App. Dec. 3, 2010) (unpublished) (case remanded for new Staff Judge Advocate's recommendation and Convening Authority's action for failure to ensure Appellant's request for deferral and waiver of forfeitures was properly considered); United States v. Matako, No. 1345, 2012 CCA LEXIS 935, \*2-9 (C.G. Ct. Crim. App. Mar. 20, 2012) (unpublished) (unreasonable post-trial delay without showing of prejudice results in sentence relief); United States v. Sapp, No. 1318, 2010 CCA LEXIS 454, \*2-9 (C.G. Ct. Crim. App. June 7, 2010) (unpublished) (unreasonable post-trial delay, including 77 days to produce Staff Judge Advocate's recommendation); United States v. Garcia, 69 M.J. 658, 664 (C.G. Ct. Crim. App. 2010) (Staff Judge Advocate's recommendation and promulgating order incorrectly list UCMJ article service member was convicted under); United States v. Beaber, No. 1319, 2010 CCA LEXIS 455, \*2-8 (C.G. Ct. Crim. App. Apr. 15, 2010) (unpublished) (unreasonable post-trial delay, including 72 days to produce Staff Judge Advocate's recommendation).

<sup>102</sup> See generally Major Franklin D. Rosenblatt, *Non-Deployable: The Court-Martial System in Combat from 2001 to 2009*, ARMY LAW, Sep. 2010, at 12.

<sup>103</sup> U.S. Department of Justice, *Office of the Pardon Attorney*, available at <http://www.justice.gov/pardon/>.

trial, the State or U.S. Attorney who brought the case has no power to grant clemency to a convicted individual. Thus the military system offers a convicted service member options not available in the civilian sector. Although the harsh sentences meted out by World War I and II courts-martial may have created a practical necessity at that time for allowing Convening Authorities to adjust the findings and/or the sentences handed down by the courts, not only does the practical necessity no longer exist but there is also no constitutionally protected due process right to seek clemency from a Convening Authority.<sup>104</sup>

Furthermore, although the Court of Appeals for the Armed Forces and the Service Courts of Criminal Appeals continue to assert that a Convening Authority is the accused's best chance of obtaining clemency,<sup>105</sup> Convening Authorities rarely exercise their clemency powers.<sup>106</sup> Regardless of the reason for why this is now the case (e.g., professional Military Judges, Government and accused represented by qualified counsel, pretrial agreements providing clemency in advance of trial in return for guilty pleas), all but a small minority of convicted service members realize no benefit from the post-trial clemency provisions found in Article 60 of the UCMJ.<sup>107</sup>

Convicted service members also have a viable alternative to seeking clemency from the Convening Authority. That is, all of the Services have functioning Clemency and Parole Boards to consider requests for clemency from convicted service members. Unlike Convening Authorities, Service Clemency and Parole Boards are independent of the court-martial process and can provide

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<sup>104</sup> *Greenholz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979) ("There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence" and "[a] state may . . . establish a parole system, but it has no duty to do so."); *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981) ("In terms of the Due Process Clause, a Connecticut felon's expectation that a lawfully imposed sentence will be commuted or that he will be pardoned is no more substantial than an inmate's expectation, for example, that he will not be transferred to another prison; it is simply a unilateral hope" (footnotes and citations omitted)). *See also Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 276 (1998) (reaffirming the Court's holding in *Dumschat*); *United States v. Mills*, 9 M.J. 687, 690 (A.C.M.R. 1980) ("The accused does not have a constitutional or statutory right to clemency from the convening authority."), *aff'd*, 12 M.J. 1 (C.M.A. 1981).

<sup>105</sup> *See, e.g.*, *United States v. MacCulloch*, 40 M.J. 236, 239 (C.M.A. 1994) (asserting, without citing authority, that "[o]ne of the last best chances an appellant has is to argue for clemency by the convening authority."), *quoted in United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001); *United States v. Wheelus*, 49 M.J. 283, 287 (C.A.A.F. 1998) (asserting that based on the cases the court sees, post-trial clemency continues to play a vital role in the military justice system, even considering the impact of pretrial agreements); *see also United States v. Barreda*, No. 20080446, 2009 CCA LEXIS 388, \*2 (A. Ct. Crim. App. Sept. 29, 2009) (citing *MacCulloch* and *Wheelus*).

<sup>106</sup> *Marinello*, *supra* note 53, at 196.

<sup>107</sup> *Id.* at 195-96 (LT Marinello's review of 807 Navy and Marine Corps special and general courts-martial convened between 1999 and 2004 found that Convening Authorities exercised clemency in only about 4% of the cases, and only about 2% of the cases in the sample convened in 2003 and 2004).

a more objective review of a convicted service member's request. For example, for 2010 and 2011, the Naval Clemency and Parole Board considered a total of 1,081 clemency requests and approved 25, for an approval rate of 2.3%.<sup>108</sup> In addition, the Board considered 257 parole requests during the same period and approved 41, for an approval rate of 16.0%.<sup>109</sup> The Army Clemency and Parole Board considered 2,457 clemency requests during the 2010-2011 period and approved 37, or 1.5%. The Army Clemency and Parole Board also reviewed 735 parole requests during the period, approving 141, or 19.2%.<sup>110</sup> Finally, the Air Force Clemency and Parole Board considered a total of 351 clemency requests during 2010 and 2011, approving 14 requests, or 4.0%. The Air Force Clemency and Parole Board reviewed 193 parole requests during the same period, granting 71, or 36.8%.<sup>111</sup>

Relying on the Service Clemency and Parole Boards vice Convening Authorities to consider convicted service member clemency requests is consistent with Congress's expressed intent that to the extent possible, post-trial procedures should mirror those found in the Federal system. Article 36 of the UCMJ states in relevant part:

[P]ost-trial procedures . . . for cases . . . triable in courts-martial . . . may be prescribed by the President by regulation which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.<sup>112</sup>

Given this Congressional mandate and that (1) Service Clemency and Parole Boards essentially equate to their State and Federal counterparts and provide convicted service members with sufficient opportunity for meaningful clemency; (2) the World War I and II military justice structural conditions that justified the Convening Authority's post-trial clemency powers no longer exist; and (3) Convening Authorities rarely use their clemency power for the benefit of convicted service members, it no longer makes sense to sustain complex and error-prone Convening Authority post-trial clemency procedures.

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<sup>108</sup> NAVAL CLEMENCY AND PAROLE BOARD, ANNUAL CLEMENCY AND PAROLE REPORTS FOR 2010-2011 (on file with author). The Naval Clemency and Parole Board handles requests submitted by convicted Naval, Marine Corps and Coast Guard service members.

<sup>109</sup> *Id.*

<sup>110</sup> ARMY CLEMENCY AND PAROLE BOARD, ANNUAL CLEMENCY/PAROLE REPORTS FOR 2010-2011 (on file with author).

<sup>111</sup> AIR FORCE CLEMENCY AND PAROLE BOARD, ANNUAL PAROLE/MSR/CLEMENCY RATES FOR 2010-2011 (on file with author).

<sup>112</sup> UCMJ art. 36 (2012).

The underlying rationale for Commanders granting clemency as an exercise of their command prerogative over good order and discipline has also changed. Perhaps most significantly, courts-martial are no longer the disciplinary tool of choice for relatively minor disciplinary infractions such as unauthorized absences or drug abuse detected by urinalysis testing. Instead, Commanders rely on nonjudicial punishment or summary courts-martial when they desire to have a member return to their unit after disciplinary action is taken, or a combination of nonjudicial punishment or summary courts-martial and administrative separation processing when they do not.<sup>113</sup>

The advantages to the Commander of this approach for misdemeanor level offenses are speed and control. A Commander can impose nonjudicial punishment and process an enlisted member for administrative separation in a fraction of the time it takes to handle a matter at court-martial, and there is no years-long appeal process where the service member remains on appellate leave with full medical, Commissary, and Exchange benefits.<sup>114</sup> Even more important, the Commander retains control of the outcome in nonjudicial punishment cases and can tailor any punishment imposed to the needs of the unit and the accused service member.

In terms of a Commander's control over the outcome, special and general courts-martial are much less flexible. Once the Commander convenes a court and refers charges to it, the matter falls under the control of the professional Military Judge. Accordingly, Commanders reserve general and special courts-martial for more serious (e.g., felony level) offenses and cases where they do not want the service member to return to the unit if he or she is found guilty by the court.<sup>115</sup>

Commanders may exercise some control over the sentence to be served by a service member either through forum selection<sup>116</sup> or by entering into a

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<sup>113</sup> Commanders may also defer action to civilian authorities in the United States. State courts routinely prosecute service members for domestic violence and off-installation driving under the influence of alcohol offenses. Commanders may process service members for administrative separation based upon their civilian conviction or the serious nature of the underlying misconduct. See U.S. DEP'T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS encl. 3 para. 10 (28 Aug. 2008 incorporating Change 3 of 30 Sep. 2011); U.S. DEP'T OF DEF., INSTR. 1332.30, SEPARATION OF REGULAR AND RESERVE COMMISSIONED OFFICERS encl. 2 para. 2 (11 Dec. 2008 incorporating Change 2 of 20 Sep. 2011).

<sup>114</sup> See *supra* note 7.

<sup>115</sup> One instance where Commanders tend to refer relatively minor cases to a special or general court-martial is when the service member refuses nonjudicial punishment. See MCM, *supra* note 1, pt. V, ¶ 3.

<sup>116</sup> For example, the Commander may refer the case to a special court-martial where no bad conduct discharge is authorized (a "non-BCD special"), or a special court-martial where the sentence is limited to the jurisdictional limitations of the court (see MCM, *supra* note 1, R.C.M. 201(f)(2),

pretrial agreement with the service member in return for the service member's guilty pleas to some or all of the charges and specifications. In this sense, Commanders fully exercise their prerogative to grant clemency before trial and there is no need to do so post-trial. Similarly, where a service member decides not to plead guilty and to have the government prove guilt beyond a reasonable doubt in a contested case, not only would a Commander be unlikely to want the member, if convicted, to return to the unit, but also the Commander may feel that the sentence awarded by the court-martial is a fair cost the convicted service member should now bear as a consequence of his choice.

Finally, in the case of a general court-martial, the Convening Authority will likely have had little or no personal exposure to the accused prior to the court-martial, so he or she is unlikely to have any specialized knowledge about the accused that puts the Convening Authority in any better position to consider a clemency request than the Service Clemency and Parole Board.<sup>117</sup> In short, not only has the need for a Commander to exercise post-trial clemency disappeared, but there are essentially no incentives for doing so.

The final consideration, which is related to the last, is that post-trial processing must function as well during conflict as it does during peacetime.<sup>118</sup> When introducing the proposed UCMJ on the floor of the House of Representatives on 5 May 1949, Congressmen Brooks from Louisiana stated the following:

We cannot escape the fact that the law which we are now writing will be as applicable and must be as workable in time of war as in time of peace, and, regardless of any desires which may stem from an idealistic conception of justice, we must avoid the enactment of provisions which will unduly restrict those who are responsible for the conduct of our military operations.<sup>119</sup>

Technical post-trial procedures that unnecessarily distract a Commander from his primary mission, that give rise to appealable legal errors

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1003), or a general court-martial where the maximum sentence is that applicable to the specific offenses charged (*see* MCM, *supra* note 1, R.C.M. 1003; MCM, *supra* note 1, pt. IV, ¶¶ 4-113).

<sup>117</sup> At least in theory, in the case of a special court-martial convening authority, the accused is a member of the Convening Authority's command and the Convening Authority may have better exposure to the convicted service member's character and worthiness for clemency. This more detailed knowledge on the part of the Convening Authority can be a two-edged sword and given that the service member will have just been convicted of an offense serious enough to be tried by a special court-martial, the detailed knowledge will likely cut against clemency.

<sup>118</sup> *See* 95 CONG. REC. 5721-22 (1949).

<sup>119</sup> *Id.*

unrelated to the issue of guilt or innocence, and that absorb valuable command resources in execution, fail this mandate.<sup>120</sup> Recognizing their ability to exercise their command prerogative through non-judicial punishment or pretrial through forum selection and pretrial agreements, Commanders are much better served by a fair but efficient disciplinary process that quickly and effectively addresses disciplinary matters at the front if need be, with any required follow-on actions to be taken away from the front by those whose primary duty it is to focus on military justice—that is the Military Judge and the appellate courts.

The simplified post-trial processing model that works on all three counts is to make court-martial sentences self-executing. That is, with the exception of any dismissal or punitive discharge, the sentence of the court-martial as modified by the terms of any pretrial agreement approved by the Military Judge becomes effective upon announcement. Any dismissal or punitive discharge would be executed only upon completion of appellate review, just as it is today. As previously discussed, this was the conclusion reached by the Navy General Court-Martial Sentence Review Board in 1946 and the Acting Judge Advocate General of the Army, Brigadier General Ansell, at the conclusion of World War I.<sup>121</sup> While those recommendations were perhaps premature because court-martial practice was then in the early stages of transition from a pure disciplinary tool controlled by the Commander to a more traditional court controlled by a professional Military Judge with lawyer counsel representing both sides, that transition is now complete and any barriers to a self-executing sentence have since been cleared.

There are two ways to implement the self-executing sentence model. The first approach would be to closely parallel the Federal court system consistent with UCMJ Article 36's Congressional mandate and have the authenticated record of trial forwarded to the appropriate appellate authority under UCMJ Article 64, 66, or 69, without any post-trial authorities or responsibilities on the part of the Convening Authority or the Staff Judge Advocate or Legal Officer. The second approach would be to allow the Convening Authority to grant clemency within a specified time period after trial, but before the authenticated record of trial is forwarded to the appropriate

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<sup>120</sup> A logical counter argument would be that the UCMJ espoused by Congressman Brooks and enacted in 1950 included provisions for even more complex post-trial processing procedures than are in place today. However, as previously noted, substantial reforms have taken place since that original floor debate, including the Military Justice Act of 1968 and the Military Justice Act of 1983, obviating the need for the more rigorous procedures enacted in 1950. Similarly, the nature of the cases handled by courts-martial has evolved to where courts-martial now are used primarily to try only the most serious cases, resulting in fewer situations where a Commander might consider returning a convicted service member to a war-fighting unit.

<sup>121</sup> See *supra* notes 80-85 and accompanying text.

appellate authority and without the requirement that the Convening Authority take action on the sentence. Common to both approaches, once the sentence is announced and the Military Judge gives effect to the terms of any pretrial agreement, the sentence is effective and shall be executed with the exception of any dismissal or punitive discharge, which must await appellate review. Both approaches retain the requirements that Trial Counsel and Defense Counsel review the record of trial for errors and that the Military Judge authenticate the record of trial.

The first approach, which shall be referred to as the Federal model because it parallels the practice in Federal courts, is simple, easy to implement, and constitutionally sound. Post-trial processing errors would all but be eliminated, post-trial processing times would be reduced significantly and concomitantly convicted service members would receive a more timely appeal and spend less time on appellate leave consuming valuable government resources. Convicted service members would still be able to seek clemency from Service Clemency and Parole Boards. Similarly, Commanders would still exercise control over the possible sentence outcomes of the case through forum selection and pretrial agreements. Finally, the Federal model works equally well in time of war and peace; in fact, it relieves Commanders and their staffs of a significant post-trial burden relating to convicted service members who they likely do not want to return to their commands.

The Federal model is not free from limitations. On the surface, even though a convicted service member retains a viable clemency alternative through the Service Clemency and Parole Boards, and even though Convening Authorities rarely grant clemency, the Defense Bar could criticize this approach because it eliminates the opportunity to seek clemency from Convening Authorities post-trial.<sup>122</sup> Similarly, even though Convening Authorities rarely grant post-trial clemency, Commanders may see the Federal model as an erosion of their authority over good order and discipline.

Related to the elimination of the Convening Authority's post-trial authorities are certain technical issues that would have to be overcome under the Federal model. For example, under current post-trial practice, if the Military Judge recommends that all or a portion of the sentence awarded by a court-martial be suspended, it is generally the Convening Authority who does so in the Convening Authority's action.<sup>123</sup> If the Federal model is adopted, this would

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<sup>122</sup> The Federal model also highlights the need of the Defense Bar to present a robust sentencing case on behalf of their clients vice holding back at trial in the hope of obtaining clemency. As previously noted, such a strategy is unlikely to produce the desired result because Convening Authorities rarely grant clemency.

<sup>123</sup> UCMJ art. 60(c)(2); MCM, *supra* note 1, R.C.M. 1107(f)(4)(B).

have to change, perhaps giving Military Judges the authority to suspend sentences, or simply looking to the authority found in UCMJ Article 74 to address the suspension recommendation.<sup>124</sup> Similarly, Convening Authorities would no longer be in a position to order a rehearing of a case, either on the merits or on the sentence. Instead, such direction would need to come from an appellate authority; specifically, the general court-martial convening authority pursuant to UCMJ Article 64, an appellate court pursuant to Article 66, or a Service Judge Advocate General pursuant to Article 69.

If the Federal model is adopted, Article 60 of the UCMJ would be eliminated,<sup>125</sup> taking with it the Staff Judge Advocate or Legal Officer's recommendation and any supplemental recommendations, the Convening Authority's action, and the submission of matters by the Defense for consideration by the Convening Authority prior to the Convening Authority taking action. Once a court-martial is over, either an innocent service member is re-integrated into the unit or the post-trial processing of a convicted service member is handled solely within military justice channels.

The Federal model brings transparency to the process because the sentence to be served<sup>126</sup> is announced by the Military Judge, and the Convening Authority is immediately able to publicize the results of trial to the command, maximizing the sentence's deterrent effect. In addition, the command can immediately return its attention to its primary mission and leave the distractions of the court-martial behind. And, the convicted service member will spend less time waiting for his case to be reviewed on appeal because the time-consuming steps that add little or no value to the post-trial process are eliminated, yet his ability to pursue clemency through the applicable Service Clemency and Parole Board remains intact.<sup>127</sup>

An alternative to the Federal model is the Hybrid model. Under the Hybrid model, the sentence is self-executing in exactly the same manner as it is in the Federal model and the requirements for the Staff Judge Advocate or Legal Officer's recommendation and Convening Authority's action are eliminated. However, unlike the Federal model, the Hybrid model replaces Article 60's complex and outdated procedures with a streamlined process for the Defense to request, and the Convening Authority to grant, clemency. The Hybrid model

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<sup>124</sup> See UCMJ, Article 74; MCM, *supra* note 1, R.C.M. 1108.

<sup>125</sup> Only subsection (a) of Article 60, which requires that the Convening Authority be promptly notified of the results of trial, would remain. This remaining provision could be re-designated under another article, such as Article 53 (Court to announce action).

<sup>126</sup> That is, the sentenced adjudged by the court as modified by any pretrial agreement.

<sup>127</sup> To assist with implementation of the Federal model, a proposed draft of UCMJ Articles 53, 57 and 60 (and other significantly affected UCMJ articles) appears at Appendix A.

addresses the potential Defense Bar and warfighter criticisms of the Federal model by preserving the ability of the Convening Authority to grant post-trial clemency. The trade-offs, though, are time and complexity.

Under the Hybrid model, the record of trial would be sent to the Convening Authority immediately after authentication. The convicted service member and/or his or her counsel would then have up to 10 days to submit a request for clemency, together with any supporting documents, for the Convening Authority to consider. If, after considering the request for clemency, the Convening Authority decides not to grant the request, the Convening Authority need only forward the record of trial, together with any request for clemency submitted by the convicted service member, to the appropriate appellate review authority with an endorsement indicating the request for clemency was considered<sup>128</sup> but denied with no explanation or elaboration required. If the Convening Authority chooses to grant clemency, the Convening Authority would so indicate on the forwarding endorsement, effecting the sentence relief in much the same manner that Rule for Court-Martial 1108(b) allows Commanders of a convicted service member to effect clemency, with the additional authority to mitigate the findings of the court-martial.<sup>129</sup> The forwarding endorsement could be further simplified by specifying in a substantially revised UCMJ Article 60 that forwarding endorsements are to be submitted to appellate authorities in the manner prescribed by Service Secretaries, who in turn would promulgate a standard form for such purpose.

Significantly, the Hybrid approach would not require the Staff Judge Advocate or Legal Officer to provide the Convening Authority with a written recommendation prior to the Convening Authority deciding whether to grant clemency *sua sponte* or in response to a request. Clemency is not a legal determination but a command prerogative. In that sense, the Convening Authority's judgment about what is best for the convicted service member, the unit and its mission, and the Service in general is likely better when unencumbered by a legal opinion authored by someone with less military and life experience. That being said, the Hybrid model provides that the Convening Authority may consult with a Staff Judge Advocate or Legal Officer prior to deciding whether to grant clemency to a convicted service member, but that any

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<sup>128</sup> Under the current or proposed post-trial processing procedures, a sound practice for Convening Authorities is to initial and date any matters submitted by the accused or Defense Counsel documenting that the material was considered by the Convening Authority.

<sup>129</sup> In the alternative, the Convening Authority's clemency power could be limited to suspending or remitting the unexecuted part of the sentence, leaving consideration of the findings to appellate authorities. Regardless of which alternative is selected, the authority to order a provision in revision or a rehearing, should be left to appellate authorities. This approach is consistent with the Federal model.

opinion of the Staff Judge Advocate or Legal Officer need not be in writing and the Convening Authority need not follow the advice or recommendation.<sup>130</sup>

Ensuring the Convening Authority receives a robust and accurate Report of Results of Trial further alleviates the need for a written Staff Judge Advocate or Legal Officer's recommendation. In practice, Reports of Results of Trial set forth the pleas and findings for each charge and specification, the sentence adjudged by the court, a summary of the pretrial agreement and its impact on the sentence adjudged, and any confinement credit to be awarded.<sup>131</sup> Much of this information duplicates what is included in the Staff Judge Advocate or Legal Officer's recommendation, so in that sense, the Staff Judge Advocate or Legal Officer's recommendation is redundant. Recognizing a Convening Authority's likely familiarity with a court-martial case he or she convened, an accurate Report of Results of Trial and any matters submitted by the convicted service member provide the Convening Authority with the information he or she needs to make an informed decision regarding clemency. In practice, though, Convening Authorities may want to consult with their Staff Judge Advocate or Legal Officer before making a clemency decision.<sup>132</sup>

Building even streamlined clemency procedures into the post-trial process will make records of trial take longer to compile and add complexity to the post-trial process. The Hybrid model, however, minimizes the additional time by requiring the convicted service member and/or Defense Counsel to submit any clemency request within 10 days of the authentication of the record of trial. Because under the Hybrid model no Staff Judge Advocate or Legal Officer recommendation is required and because the focus is on clemency and not on any possible legal errors in the record of trial (which will be addressed by the appellate authority), the convicted service member and/or Defense Counsel can begin to assemble any clemency request immediately upon conclusion of trial. The 10-day post authentication deadline provides the convicted service member and Defense Counsel additional time to refine any submission based upon the authenticated record of trial.<sup>133</sup>

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<sup>130</sup> To assist with implementation of the Hybrid model, a proposed draft of UCMJ Articles 57 and 60 (and other significantly affected UCMJ articles) appears at Appendix B.

<sup>131</sup> See JAGMANUAL, *supra* note 11, at 0149, app. A-1-q.

<sup>132</sup> A Convening Authority is unlikely to read an entire record of trial given its length, but it should be available to a Convening Authority should he or she desire to consult it. Similarly, because clemency is an exercise of command prerogative, the Convening Authority must be free to consult other sources of information, including the convicted service member's service record, in reaching a clemency decision. The Convening Authority need not specify what information was consulted.

<sup>133</sup> Ideally, the implementing Rules for Courts-Martial should specify that Defense Counsel need not submit clemency requests in every case, particularly when, in Defense Counsel's judgment, the chances of obtaining clemency are nil. For example, where the accused received the benefit of a

Because the Hybrid approach entails more complex post-trial procedures than the Federal model, it will by necessity give rise to more appellate litigation, albeit less than that generated under the current system. Stripped to its bare essence, the Hybrid approach involves three post-trial steps: the preparation of the Report of Results of Trial, the possible submission of a clemency request, and a clemency decision. Each step in the process creates opportunities for allegations of error and challenges on appeal. In contrast, the Federal model involves only the forwarding of the authenticated record of trial directly to the appellate authority, creating essentially no opportunities for error. At the opposite extreme is the current post-trial system, which involves multiple technical reports, acts and submissions, making the current post-trial process ripe for generating appealable error. By this measure, the Hybrid model is clearly superior to the current model, but less desirable than the Federal model.

The Federal model and the Hybrid model for post-trial processing of general and special courts-martial are far superior to the current post-trial processing regime. In sum, both the Federal and the Hybrid models make the sentence adjudged by a court-martial self-executing and both eliminate the need for the Convening Authority's action and the Staff Judge Advocate or Legal Officer's recommendation. The Federal model further streamlines the post-trial process by allowing authenticated records of trial to be sent directly to appropriate appellate authorities for review, thus directing any requests for clemency to the existing Service Clemency and Parole Boards. The Federal model also facilitates more timely appeals for convicted service members and allows Commanders and their legal staffs to focus on their commands' primary missions. The Hybrid approach trades the speed and simplicity of the Federal model for control. Under the Hybrid model, Convening Authorities retain the ability to augment their pretrial clemency decisions<sup>134</sup> through the granting of post-trial clemency requests.

The Joint Service Committee on Military Justice should study both the Federal and the Hybrid models and make recommendations for implementation not later than 31 December 2013. In deciding upon the ultimate approach to be recommended to Congress, the Joint Service Committee should consult with both the Defense Bar and Commanders who routinely convene courts-martial from all of the Services and the Coast Guard. As both options pass

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pretrial agreement and there is no new information for the Convening Authority to consider, submitting a clemency request may be a waste of time and effort. Such a provision would help insulate Defense Counsel from claims of ineffective assistance of counsel for cases that do not merit clemency requests; however, even with such a rule, it is hard to see how anything but case-by-case determinations by the appellate courts can be avoided.

<sup>134</sup> That is, forum selection and entering into pretrial agreements.

constitutional muster, ultimately the recommended option will be a balance between the competing interests of these two primary constituencies. While precisely where that balance will be drawn cannot be predicted with certainty, what is certain is that the current post-trial processing regime is an anachronism that must change.

## V. Conclusion

Just as global conflicts involving massive conscript armies from the first half of the last century have scaled down to regional conflicts involving fewer forces and more precise weaponry, the U.S. court-martial practice has changed as well. Gone are the days when thousands of courts-martial are conducted routinely at the front with no lawyers involved and minimal due process rights for the accused. Today's court-martial practice includes substantial protections for the accused, including a professional trial judiciary and appellate courts, representation by qualified military counsel, and rules of evidence and procedure that largely parallel the Federal court system.

Perhaps partially because of these increased protections, which necessarily introduce complexity, time and cost, the number of general and special court-martial cases being tried by the Services has plummeted in the last 10 years. Although on its face this appears to be good news for the Services, it does not necessarily mean that crime is on the decrease. Indeed, many minor cases that used to be handled by courts-martial are now handled administratively or left to civilian authorities to prosecute. And to the extent Commanders are resorting to these options because courts-martial have become too complex, good order and discipline suffers. A special or general court-martial, convened by the Commander and composed of members from the command, sends a stronger, more visible good order and discipline message to the unit than handling the matter innocuously out in town. Even acquittals send a positive message—that the military justice system is just and service members accused of offenses will get a fair trial should they find themselves subjected to the system.

Current post-trial processing procedures are part of the problem. That is, the requirements for a Convening Authority's action and a Staff Judge Advocate or Legal Officer's recommendation detract from a court-martial's utility because they make the court-martial option more complex than is constitutionally required, consume valuable command time and resources, and create the opportunity for appealable error unrelated to the issue of a guilt or innocence. Accordingly, the requirements for a Convening Authority's action and a Staff Judge Advocate or Legal Officer's recommendation should be eliminated.

To implement these required reforms and keep military justice relevant and useful to the warfighter, the Joint Service Committee on Military Justice should recommend to Congress that court-martial sentences, as modified by any pretrial agreement accepted by the Military Judge, be self-executing. The Joint Service Committee should further recommend that post-trial processing either follow the Federal model, where the authenticated record of trial is forwarded directly to the appellate authority and clemency is left to the Service Clemency and Parole Board, or the Hybrid model, where Convening Authorities retain a streamlined authority to grant clemency. Because the decision to grant clemency is a command prerogative and not a legal determination, Convening Authorities need not be required to consult with a Staff Judge Advocate or Legal Officer for a recommendation, although they certainly may do so. Which model the Joint Service Committee ultimately recommends should be based on feedback from warfighters and the Defense Bar, with the preference being the Federal model because it is most effective and efficient. However, should there be insufficient support for the Federal model, the Hybrid model should be vigorously pursued because it is far superior to the current construct.

Adoption of either the Federal model or the Hybrid model will be a major step in keeping military justice viable. Without these and similar reforms that simplify the military justice system and inject flexibility for the warfighter without compromising fundamental due process rights of the accused, Commanders will continue to turn to alternative dispositions in increasing numbers and the practice of military justice will wither on the vine. Although that may be an attractive option to some, especially when shrinking budgets demand all support functions be subjected to the budget cutter's axe, a fair military justice system is too fundamental to good order and discipline and a unit's fighting effectiveness to allow it to be jeopardized. Accordingly, the Joint Service Committee on Military Justice should recommend to Congress that either the Federal model or the Hybrid model of post-trial processing be implemented without delay.

## Appendix A

### Proposed Revisions to the UCMJ under the Federal Model

In implementing the Federal model, substantive changes would need to be made to UCMJ Article 57 to make court-martial sentences self-executing, to redesignate UCMJ Article 60(a) under UCMJ Article 53, and to eliminate the remaining requirements under UCMJ Article 60(b)-(e). Conforming changes would need to be made to other articles and to the Rules for Courts-Martial. The following reflects proposed changes to UCMJ Articles 53, 57, and 60 to implement the Federal model, as well as selected conforming changes to other affected UCMJ articles.

#### § 853. Art. 53. Announcement of results

- (a) A court-martial shall announce its findings and sentence to the parties as soon as determined.
- (b) The findings and sentence of a court-martial, as modified by the terms of any approved pretrial agreement, shall be reported promptly to the convening authority after announcement of the sentence. Any such submission shall be in writing.

#### § 857. Art. 57. Effective date of sentences

- (a) The sentence awarded by a court-martial, as modified by the terms of any approved pretrial agreement, becomes effective upon pronouncement at the conclusion of trial and, with the exception of any discharge or dismissal, shall be executed immediately unless otherwise specified in this title.
- (b) Any forfeiture of pay or allowances or reduction in grade included in the sentence of a court-martial, as modified by the terms of any approved pretrial agreement, shall be executed 14 days after the date on which the sentence is adjudged. A forfeiture of pay and allowances shall be applicable to pay and allowances accruing on and after the date on which the sentence is executed.
- (c) On application by an accused, the convening authority may defer a forfeiture of pay or allowances or reduction in grade that would otherwise be executed under paragraph (b) until not later than the date the authenticated record of trial is forwarded to the appropriate appellate review authority under section 864,

866, or 869 of this title. Such deferment may be rescinded at any time by the convening authority.

(d) Any period of confinement included in a sentence of a court-martial, as modified by the terms of any approved pretrial agreement, begins to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended or deferred shall be excluded in computing the service of the term of confinement.

**§ 857a. Art. 57a. Deferment of sentences**

(a) On application by an accused who is under sentence to confinement, the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned, may in his sole discretion defer service of the sentence to confinement. Unless an earlier date is specified, the deferment shall terminate on the date the authenticated record of trial is forwarded to the appropriate appellate review authority under section 864, 866, or 869 of this title. The deferment may be rescinded at any time by the officer who granted it or, if the accused is no longer under his jurisdiction, by the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned.

(b) [No change.]

(c) In any case in which a court-martial sentences a person to confinement, but in which review of the case under section 867(a)(2) of this title (article 67(a)(2)) is pending, the Secretary concerned may defer further service of the sentence to confinement while that review is pending.

**§ 858a. Art. 58a. Sentences: reduction in enlisted grade**

(a) Unless otherwise provided in regulations to be prescribed by the Secretary concerned, a court-martial sentence, as modified by the terms of any approved pretrial agreement, of an enlisted member in a pay grade above E-1 that includes –

- (1) a dishonorable or bad-conduct discharge;
- (2) confinement; or
- (3) hard labor without confinement;

reduces that member to pay grade E-1, effective 14 days after the date on which the sentence is adjudged.

(b) If the sentence of a member who is reduced in pay grade under subsection (a) is modified in whole or in part such that it does not include any punishment named in subsection (a)(1), (2), or (3), the rights and privileges of which he was deprived because of that reduction shall be restored to him and he is entitled to the pay and allowances to which he would have been entitled for the period the reduction was in effect, had he not been so reduced.

**§ 858b. Art. 58b. Sentences: forfeiture of pay and allowances during confinement**

(a)

(1) [Replace “under section 857(a) of this title (article 57(a))” with “under section 857(b) of this title (article 57(b))”].

(2) [No change.]

(b) In a case involving an accused who has dependents, the convening authority may waive any or all of the forfeitures of pay and allowances required by subsection (a) for a period not to exceed six months. Any amount of pay or allowances that, except for a waiver under this subsection, would be forfeited shall be paid, as the convening authority directs, to the dependents of the accused. Under regulations of the Secretary concerned, a commissioned officer commanding for the time being, a successor in command, or any person exercising general court-martial jurisdiction may act under this section in place of the convening authority.

(c) If the sentence of a member who forfeits pay and allowances under subsection (a) is modified in whole or in part such that the remaining sentence does not provide for a punishment referred to in subsection (a)(2), the member shall be paid the pay and allowances which the member would have been paid, except for the forfeiture, for the period which the forfeiture was in effect.

**§ 860. Art. 60. [Eliminated]**

## Appendix B

### Proposed Revisions to the UCMJ under the Hybrid Model

In implementing the Hybrid model, substantive changes would need to be made to UCMJ Article 57 to make court-martial sentences self-executing and to UCMJ Article 60 to streamline the Convening Authority's post-trial clemency power. Conforming changes would need to be made to other articles and to the Rules for Courts-Martial. The following reflects proposed changes to Articles 57 and 60 to implement the Hybrid model, as well as selected conforming changes to other affected UCMJ articles.

#### **§ 857. Art. 57. Effective date of sentences**

- (a) The sentence awarded by a court-martial, as modified by the terms of any approved pretrial agreement, becomes effective upon pronouncement at the conclusion of trial and, with the exception of any discharge or dismissal, shall be executed immediately unless otherwise specified in this title.
- (b) Any forfeiture of pay or allowances or reduction in grade included in the sentence of a court-martial, as modified by the terms of any approved pretrial agreement, shall be executed 14 days after the date on which the sentence is adjudged. A forfeiture of pay and allowances shall be applicable to pay and allowances accruing on and after the date on which the sentence is executed.
- (c) On application by an accused, the convening authority may defer a forfeiture of pay or allowances or reduction in grade that would otherwise be executed under paragraph (b) until not later than the date the convening authority forwards the authenticated record of trial to the appropriate appellate review authority under section 864, 866, or 869 of this title. Such deferment may be rescinded at any time by the convening authority.
- (d) Any period of confinement included in a sentence of a court-martial, as modified by the terms of any approved pretrial agreement, begins to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended or deferred shall be excluded in computing the service of the term of confinement.

**§ 857a. Art. 57a. Deferment of sentences**

- (a) On application by an accused who is under sentence to confinement, the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned, may in his sole discretion defer service of the sentence to confinement. Unless an earlier date is specified, the deferment shall terminate on the date the convening authority forwards the authenticated record of trial to the appropriate appellate review authority under section 864, 866, or 869 of this title. The deferment may be rescinded at any time by the officer who granted it or, if the accused is no longer under his jurisdiction, by the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned.
- (b) [No change.]
- (c) In any case in which a court-martial sentences a person to confinement, but in which review of the case under section 867(a)(2) of this title (article 67(a)(2)) is pending, the Secretary concerned may defer further service of the sentence to confinement while that review is pending.

**§ 858a. Art. 58a. Sentences: reduction in enlisted grade**

- (a) Unless otherwise provided in regulations to be prescribed by the Secretary concerned, a court-martial sentence, as modified by the terms of any approved pretrial agreement, of an enlisted member in a pay grade above E-1 that includes –
  - (1) a dishonorable or bad-conduct discharge;
  - (2) confinement; or
  - (3) hard labor without confinement;reduces that member to pay grade E-1, effective 14 days after the date on which the sentence is adjudged.
- (b) If the sentence of a member who is reduced in pay grade under subsection (a) is modified in whole or in part such that it does not include any punishment named in subsection (a)(1), (2), or (3), the rights and privileges of which he was deprived because of that reduction shall be restored to him and he is entitled to the pay and allowances to which he would have been entitled for the

period the reduction was in effect, had he not been so reduced.

**§ 858b. Art. 58b. Sentences: forfeiture of pay and allowances during confinement**

(a)

(1) [Replace “under section 857(a) of this title (article 57(a))” with “under section 857(b) of this title (article 57(b))”].

(2) [No change.]

(b) In a case involving an accused who has dependents, the convening authority or other person authorized under section 860 of this title (article 60) may waive any or all of the forfeitures of pay and allowances required by subsection (a) for a period not to exceed six months. Any amount of pay or allowances that, except for a waiver under this subsection, would be forfeited shall be paid, as the convening authority or other person authorized under section 860 of this title (article 60) directs, to the dependents of the accused.

(c) If the sentence of a member who forfeits pay and allowances under subsection (a) is modified in whole or in part such that the remaining sentence does not provide for a punishment referred to in subsection (a)(2), the member shall be paid the pay and allowances which the member would have been paid, except for the forfeiture, for the period which the forfeiture was in effect.

**§ 860. Art. 60. Clemency from the convening authority**

(a) The findings and sentence of a court-martial, as modified by the terms of any approved pretrial agreement, shall be reported promptly to the convening authority after announcement of the sentence. Any such submission shall be in writing.

(b)

(1) The accused may submit to the convening authority matters for consideration by the convening authority with respect to the findings and sentence. Any such submissions shall be in writing. Except in a summary court-martial case, such submissions shall be made within 10 days

after the accused has been given an authenticated record of trial. In a summary court-martial case, such submissions shall be made within 7 days after the sentence is announced.

- (2) If the accused shows that additional time is required for the accused to submit such matters, the convening authority or other person authorized in subsection (c), for good cause, may extend the applicable period under paragraph (1) for not more than an additional 20 days.

- (3) [No change.]
- (4) [No change.]

(c)

- (1) [No change.]
- (2) After considering any matters submitted by the accused under subsection (b) or the time for submitting such matters expires, the convening authority or other person authorized in paragraph (1) may, in his sole discretion, grant clemency to the accused by –
  - (A) dismissing any charge or specification by setting aside a finding of guilty thereto;
  - (B) changing a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification;
  - (C) disapproving, commuting or suspending the sentence in whole or in part.

- (d) Before granting clemency under this section, the convening authority or other person authorized in subsection (c) may consult with a staff judge advocate or legal officer regarding whether to grant clemency to the accused. Any opinion rendered by the staff judge advocate or legal officer need not be in writing nor disclosed to the accused and is not binding on the convening authority or other person authorized in subsection (c). The convening authority or other person authorized in subsection (c) may also consider the results of trial, the record of trial, the service record of the

accused, and such other matter as the convening authority or other person authorized in subsection (c) deems appropriate.

(e) The convening authority or other person authorized in subsection (c) shall indicate to the appropriate appellate review authority under section 864, 866, or 869 of this title (article 64, 66, or 69) in a forwarding endorsement of the authenticated record of trial whether clemency was granted and if so, specifically what that clemency was. No explanation for granting or not granting clemency is required. The forwarding endorsement, together with the record of trial and any matters submitted by the accused under subsection (b), shall be submitted to appellate authorities in the manner prescribed by the applicable Service Secretary and shall confirm whether any matters submitted by the accused under subsection (b) were considered.

## **ARTICLE 83 MAROONED: JURISDICTION IN THE AFTERMATH OF *UNITED STATES V. KUEMMERLE***

**By: LCDR Brian D. Korn, JAGC, USN\* & LT David C. Dziengowski, JAGC, USN\*\***

### I. Introduction

Establishing whether a servicemember is subject to court-martial jurisdiction requires a straightforward analysis. Assuming the accused is neither a retiree nor a deployed civilian in wartime, the test is simply whether the service member was on active duty at the time of the offense and remains on active duty when charged.

Recent case law from the Court of Appeals for the Armed Forces (C.A.A.F.), however, has muddied the waters related to jurisdictional analysis. Specifically, *United States v. Kuemmerle*<sup>1</sup> suggests that unless *every element* of an offense occurs while the accused is on active duty, the military lacks court-martial jurisdiction.<sup>2</sup> Taken to its logical conclusion, this proposition has farther-reaching effects than what the C.A.A.F. likely imagined when deciding *Kuemmerle*. Attempted prosecutions under Article 83 of the Uniform Code of Military Justice (UCMJ)<sup>3</sup> for fraudulent enlistment or appointment will in many cases lack jurisdiction because all but the final element of these offenses occur prior to the offender obtaining active-duty status.

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\* Presently assigned to Region Legal Service Office Southeast. Previous assignments include: Defense Counsel Assistance Program, 2010 to 2012; Naval Legal Service Office North Central, 2010; Navy and Marine Corps Appellate Defense Division (Code 45), 2007-2010; Naval Legal Service Office Mid-Atlantic, 2005 to 2007.

\*\* Presently assigned to Navy and Marine Corps Appellate Defense Division (Code 45). Previous assignments include: Rule of Law Field Support Officer, Rule of Law Field Force - Afghanistan, October 2011 to April 2012; Naval Legal Service Office North Central, 2009 to 2012. Special thanks are due to CDR Julia W. Crisfield, JAGC, USN, who provided invaluable mentorship and direction as lead counsel in the general court-martial that occasioned this article.

<sup>1</sup> United States v. Kuemmerle, 67 M.J. 141, 143 (C.A.A.F. 2009).

<sup>2</sup> See *infra* Part II.D (detailing the decision in *Kuemmerle*).

<sup>3</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶7 (2012) [hereinafter MCM].

This article explores the history of court-martial jurisdiction, tracing case law from the mid-1800s to the present. The article then turns to the 2009 *Kuemmerle* case that modified jurisdiction jurisprudence while following Supreme Court precedent. Next, the article turns to Article 83 and lays bare its flawed nature, specifically the military's lack of court-martial jurisdiction over an entire category of people. The article will demonstrate that because Congress has reached beyond the scope of its constitutionally enumerated power,<sup>4</sup> the inescapable conclusion is that a portion of Article 83 is unconstitutional. The article then separates the invalid portions of Article 83 from the valid ones, making plain those portions of Article 83 that remain viable charging options for convening authorities.<sup>5</sup>

## II. History of Military Jurisdiction

A condition precedent to trial by court-martial is jurisdiction.<sup>6</sup> Military courts-martial can only hear cases in which the accused is subject to the UCMJ.<sup>7</sup> Article 2 of the UCMJ expressly describes those persons who are “subject to this chapter[.]”<sup>8</sup> That section describes the following categories of persons: “[m]embers of a regular component of the armed forces” and “[i]nductees *from the time of their actual induction* into the armed forces.”<sup>9</sup>

### A. Court-Martial Jurisdiction Until 1969

In a series of decisions from 1866 to 1960, the Supreme Court of the United States held that the proper exercise of court-martial jurisdiction over an

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<sup>4</sup> U.S. CONST. art. I, § 8, cl. 14 (“The Congress shall have power to . . . make Rules for the Government and Regulation of the land and naval Forces.”) (emphasis added).

<sup>5</sup> This position, of course, requires a ruling that the unconstitutional provisions of Article 83 can be severed, leaving intact the remainder of Article 83 and the Uniform Code of Military Justice [hereinafter *UCMJ*].

<sup>6</sup> Indeed, a condition precedent to any trial by any court is jurisdiction. For purposes of this Article, the focus is only on courts-martial. Courts-martial are federal courts and as recently articulated by the United States Court of Appeals for the Ninth Circuit, “[i]t is a bedrock principle that the federal courts are courts of limited jurisdiction.” *Catholic League for Religious & Civ. Rights v. City of San Francisco*, 624 F.3d 1043, 1081 (9th Cir. 2009). It follows then, that courts-martial are courts of limited jurisdiction that, absent qualified circumstances, must decline to hear certain cases that might otherwise be meritorious. *Accord United States v. French*, 27 C.M.R. 245, 251 (C.M.A. 1959) (“Courts-martial are courts of limited jurisdiction and have only the powers delegated to them by Congress.”).

<sup>7</sup> See *supra* note 4. Although there are instances in which the UCMJ envisions trial by persons not subject to the code (See, e.g. MCM, *supra* note 3, pt IV, ¶30 (2012) (Spying)), these provisions of the UCMJ are not at issue in this article.

<sup>8</sup> UCMJ art. 2(a)(1) (2012).

<sup>9</sup> *Id.* (emphasis added).

offense relied solely on the military status of the accused.<sup>10</sup> This view was based on the Court's interpretation of the "natural meaning" of article I, section 8, clause 14 of the U.S. Constitution, as well as the Fifth Amendment's exception for "cases arising in the land or naval forces":<sup>11</sup>

[M]ilitary jurisdiction has always been based on the "status" of the accused, rather than on the nature of the offense. To say that military jurisdiction "defies definition in terms of military 'status'" is to defy the unambiguous language of art. I, s. 8, cl. 14, as well as the historical background thereof and the precedents with reference thereto.<sup>12</sup>

For nearly one hundred years, therefore, in order to establish jurisdiction, one looked no further than whether someone was on active duty at the time of the commission of the alleged offense.

#### B. Court-Martial Jurisdiction from 1969 to the Present

In 1969, this jurisdictional standard changed when the Supreme Court determined that a military court may not try a servicemember charged with a crime that lacked a service connection in *O'Callahan v. Parker*.<sup>13</sup> This holding was based on the belief that, historically, the public viewed the fairness of military trials of servicemembers charged with civilian offenses with great suspicion:<sup>14</sup>

[C]onceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution

<sup>10</sup> See *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 240-241, 243 (1960); *Reid v. Covert*, 354 U.S. 1, 22-23 (1957) (plurality opinion); *Grafton v. United States*, 206 U.S. 333, 348 (1907); *Johnson v. Sayre*, 158 U.S. 109, 114 (1895); *Smith v. Whitney*, 116 U.S. 167, 183-186 (1886); *Coleman v. Tennessee*, 97 U.S. 509, 513-515 (1878); *Ex parte Milligan*, 71 U.S. 2, 123 (1866); Cf. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15 (1955); *Kahn v. Anderson*, 255 U.S. 1, 6-10 (1921); *Givens v. Zerbst*, 255 U.S. 11, 19-21 (1921).

<sup>11</sup> *Solorio v. United States*, 483 U.S. 435, 439 (1987) (citing *Covert*, 354 U.S. at 19; *Toth*, 350 U.S. at 15).

<sup>12</sup> *Kinsella*, 361 U.S. at 243.

<sup>13</sup> *O'Callahan v. Parker*, 395 U.S. 258, 272 (1969), overruled by *Solorio*, 483 U.S. 435

<sup>14</sup> *O'Callahan*, 395 U.S. at 268.

has deemed essential to fair trials of civilians in federal courts.<sup>15</sup>

....

A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved.<sup>16</sup>

In order to alleviate what it saw as an inherent unfairness, the *O'Callahan* Court abandoned the status-of-the-accused test, adopting the service-connection test in its stead.<sup>17</sup> In so doing, the Court held that an active-duty servicemember's off-base sexual assault on a civilian with no connection to the military could not be tried by court-martial.<sup>18</sup>

### C. *Solorio v. United States*<sup>19</sup>

In 1987, the Supreme Court expressly overruled *O'Callahan*, abandoning the service-connection test.<sup>20</sup> In *Solorio*, the Court found that the Coast Guard had jurisdiction to prosecute a Coast Guardsman for sexually assaulting two young girls in his private home.<sup>21</sup> The Court held "that the requirements of the Constitution are not violated where, as here, a court-martial is convened to try a serviceman who was a member of the Armed Services at the time of the offense charged."<sup>22</sup> The test for jurisdiction once again turned on the status of the accused at the time of the offense.<sup>23</sup>

*Solorio* signaled a return to the pre-*O'Callahan* test, where one must only ask two simple questions in order to determine whether court-martial jurisdiction exists: (1) was the accused on active duty at the time of the alleged offense; and (2) does the accused remain on active duty at the time of the charge?<sup>24</sup> It became axiomatic that a court-martial does not have jurisdiction

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<sup>15</sup> *Id.* at 262.

<sup>16</sup> *Id.* at 265.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Solorio v. United States*, 483 U.S. 435 (1987).

<sup>20</sup> *Id.* at 449-51.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 450-51.

<sup>23</sup> *See id.*

<sup>24</sup> See, e.g., *United States v. Chodara*, 29 M.J. 943 (A.C.M.R. 1990) ("[A] court-martial may have subject matter jurisdiction because an offense was committed by a soldier, yet lack personal

over offenses committed by a servicemember before he entered active-duty service,<sup>25</sup> and if a court-martial does not have jurisdiction to try an accused for an offense, the charge “shall be dismissed.”<sup>26</sup>

#### D. *United States v. Kuemmerle*<sup>27</sup>

In the 2009 *Kuemmerle* case, the C.A.A.F. reconfirmed the *Solorio* rule as the exclusive test for court-martial jurisdiction.<sup>28</sup> Citing *Solorio*, the court stated that “courts-martial may *only* exercise jurisdiction over a servicemember ‘who was a member of the Armed Services at the time of the offense charged.’”<sup>29</sup> In *Kuemmerle*, the C.A.A.F. confronted the issue of jurisdiction in a case involving the distribution of child pornography.<sup>30</sup> Specifically, the accused had posted a pornographic image of a child on his *Yahoo!* profile webpage on approximately 7 September 2000, prior to enlisting in the Navy on 21 June 2001.<sup>31</sup> Notably, “[w]hile on active duty, [the accused] accessed his *Yahoo!* e-mail account, but did not update or make any modifications to his profile or the image posted on his profile.”<sup>32</sup> Upon discovery of the pornographic image by law enforcement agents on 10 August 2006, the accused was charged with distribution of child pornography.<sup>33</sup>

The accused filed a motion to dismiss the child pornography charge based on a lack of jurisdiction.<sup>34</sup> The defense argued that because the act of distributing child pornography was complete before the accused entered military service, a court-martial lacked jurisdiction to try him.<sup>35</sup>

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jurisdiction because the soldier who committed the crime has been discharged or released from service. Conversely, a court-martial may have personal jurisdiction over an accused because of his service status, yet lack subject matter jurisdiction because the offense charged was committed at a time that the accused was not a member of the armed services and thus not a person subject to the Code.”) (internal citations omitted).

<sup>25</sup> See, e.g., *United States v. Avila*, 27 M.J. 62, 64 (C.M.A. 1988); *United States v. Robertson*, No. 200101115, 2003 CCA LEXIS 123, at \*10-11 (N.M. Ct. Crim. App. May 9, 2003) (“A service member may not be held accountable in trial by court-martial for crimes committed before he enlisted in the armed forces.”).

<sup>26</sup> MCM, *supra* note 3, R.C.M 907(b)(1)(A).

<sup>27</sup> *United States v. Kuemmerle*, 67 M.J. 141 (C.A.A.F. 2009).

<sup>28</sup> *Id.* at 143.

<sup>29</sup> *Id.* (quoting *Solorio v. United States*, 483 U.S. 435, 451 (1987)) (emphasis added).

<sup>30</sup> See *Kuemmerle*, 67 M.J. at 142.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

Relying on the jurisdictional test re-established in *Solorio*, the C.A.A.F. stated that “[w]hether jurisdiction existed over the alleged offense depends on when the offense of ‘distribution’ occurs.”<sup>36</sup> That question, in turn, depended on the definition of “distribution.”<sup>37</sup> For example, if distribution occurred when the law enforcement agent discovered the image on 10 August 2006, while the accused was on active duty, court-martial jurisdiction would exist.<sup>38</sup> If, however, distribution was completed on 7 September 2000, when the accused posted the image to his *Yahoo!* profile, then no court-martial jurisdiction would exist, and the charges would have to be dismissed.<sup>39</sup>

The C.A.A.F. ultimately defined distribution as consisting of two acts: (1) posting the image; and (2) delivering the image — occurring when the agent accessed the site and viewed the image.<sup>40</sup> At first glance it would appear that the initial act — posting the image — occurred prior to the accused entering active duty. However, the court’s analysis did not end there. The court ultimately determined that jurisdiction existed because the accused accessed his *Yahoo!* profile while on active duty and made the affirmative decision not to remove the image.<sup>41</sup>

Appellant thus posted the image for other users to view on his profile and did so before entering on active duty. *Significantly, however, Appellant stipulated that he accessed his Yahoo! account while on active duty. He also stipulated that he had the ability to access the profile while on active duty, including the capacity to remove the image of child pornography.* Indeed, after he was already charged, Appellant took steps to remove the image on June 28, 2007, the same day on which he was convicted. By implication, Appellant made an affirmative decision while on active duty to *keep the image posted* on his profile. Thus, whether or not a civilian criminal offense may have occurred sometime in September 2000, when Appellant initially posted the image, an offense occurred under the UCMJ on August 10, 2006.<sup>42</sup>

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<sup>36</sup> *Id.* at 143.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (“The real question is whether Appellant committed *an* offense of distribution on August 10, 2006 . . . ”).

<sup>40</sup> *Id.* at 144-45.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* (emphasis added).

Because this “affirmative decision” to keep the image on his profile was made while the accused was on active duty, both the act of not removing the image — posting — and the act of the agent accessing and viewing the image — delivering — occurred while the accused was on active duty.<sup>43</sup> As a result, the court ruled that “the court-martial had jurisdiction over the offense of distribution on August 10, 2006, a date on which all parties agree Appellant was on active duty and subject to the UCMJ.”<sup>44</sup> Having examined the progression of court-martial jurisdiction over the years, it is now appropriate to discuss the history of Article 83.<sup>45</sup> This brief discussion sets the stage for application of *Kuemmerle* to Article 83.

### III. History of Article 83

Since 1892, the United States Military has criminalized the act of procuring an enlistment or appointment in the armed forces by knowing false representation or deliberate concealment. Fraudulent enlistment was first made punishable under Article of War 62 — the General Article — by Congressional Act in 1892.<sup>46</sup> In 1916, the Sixty-Fourth Congress introduced legislation specifically defining the crime.<sup>47</sup>

By its very nature, fraudulent enlistment or appointment requires false representations or concealments to occur prior to enlistment or commissioning. As such, any jurisdictional test that looks at the status of the accused at the time of the offense cannot be met.<sup>48</sup> In an attempt to exercise jurisdiction over servicemembers who commit these acts, Congress added the element of receipt of pay and allowances.<sup>49</sup>

The revised Article of War 54 provided that “[a]ny person who shall procure himself to be enlisted in the military service of the United States by means of willful misrepresentation or concealment as to his qualifications for enlistment, and shall receive pay or allowances under such enlistment, shall be

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<sup>43</sup> *Id.* at 145.

<sup>44</sup> *Id.*

<sup>45</sup> MCM, *supra* note 3, pt. IV, ¶7.

<sup>46</sup> Act of July 27, 1892, ch. 272, 27 Stat 278..

<sup>47</sup> S. REP. NO. 64-130, at 7 (1916).

<sup>48</sup> There are times, however, when these acts might take place while the accused is on active duty, such as in cases of fraudulent re-enlistment or fraudulent appointment of a prior-enlisted servicemember. These issues will be discussed later in the article.

<sup>49</sup> Articles of War, ch. 227, Art. 54, 41 Stat. 759 (1920), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/RAW-vol2.pdf#page=39](http://www.loc.gov/rr/frd/Military_Law/pdf/RAW-vol2.pdf#page=39) (last visited May 9, 2013).

punished as a court-martial may direct.”<sup>50</sup> In its current form under the UCMJ, Article 83 reads, in pertinent part, “[a]ny person who . . . procures his own enlistment or appointment in the armed forces by knowingly false representation or deliberate concealment as to his qualifications for the enlistment or appointment *and receives pay or allowances thereunder* . . . shall be punished as a court-martial may direct.”<sup>51</sup> The Manual for Courts-Martial (MCM), issued by Executive Order to implement the UCMJ, lists the elements of the crime as:

- (a) That the accused was enlisted or appointed in an armed force;
- (b) That the accused knowingly misrepresented or deliberately concealed a certain material fact or facts regarding qualifications of the accused for enlistment or appointment;
- (c) That the accused’s enlistment or appointment was obtained or procured by that knowingly false representation or deliberate concealment; and
- (d) That under this enlistment or appointment that accused received pay or allowances or both.<sup>52</sup>

Nevertheless, the inclusion of the element of receipt of pay and allowances has not proven to be the cure-all that Congress intended it to be. As demonstrated below, it cannot create jurisdiction because the misrepresentation/concealment element still fails the test.

#### IV. Sounding the Death Knell: *Kuemmerle* Applied to Article 83

There is no jurisdiction under Article 83 to prosecute persons for fraudulent appointment or enlistment where such appointment or enlistment results in a change from civilian to servicemember status. In other words, when a civilian joins the armed forces by procuring a commission or enlistment via “knowingly false representation or deliberate concealment as to his qualifications[,]”<sup>53</sup> there is no jurisdiction under Article 83 to prosecute that person by court-martial.<sup>54</sup> Admittedly, *Kuemmerle* did not make this so. What *Kuemmerle* did, however, was clarify two critical texts: (1) the Supreme Court ruling in *Solorio*; and (2) Article 1, Section 8, Clause 14 of the U.S.

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<sup>50</sup> *Id.*

<sup>51</sup> MCM, *supra* note 3, pt. IV, ¶7 (emphasis added).

<sup>52</sup> MCM, *supra* note 3, pt. IV, ¶7.b.(1).

<sup>53</sup> MCM, *supra* note 3, pt. IV, ¶7.a.(1).

<sup>54</sup> For the remainder of this Article, this category of persons shall be referred to as “civilian-to-servicemember persons.”

Constitution<sup>55</sup>. In so doing, *Kuemmerle* revealed that jurisdiction is lacking to try the civilian-to-servicemember category of persons. The following fact patterns demonstrate as much.

#### A. Meet Seaman Greene and Lieutenant Wotley<sup>56</sup>

Gale Greene just graduated from high school. She is eighteen years old and wants nothing more than to join the Navy and see the world. In light of her latent, genetic medical condition, however, she fears that the Navy will reject her for service. Finding no reasonable alternative due to her deep desire to serve, she deliberately conceals her medical condition from her recruiter. Gale Greene is then cleared by the Military Entrance Processing Station to enlist. She meets all other requirements and raises her right hand during a modest induction ceremony before her parents. Now Seaman Recruit Greene, she receives pay and allowances and serves as a member of the regular component of the armed forces. Her future looks bright until her concealment is exposed.

Upon her promotion to seaman (SN), her chain of command learns of her medical condition and scheme of concealment. The command grows livid. The commanding officer's staff judge advocate recommends a special court-martial as the proper vehicle to adjudicate the matter. A single charge under Article 83 is referred, and SN Greene is arraigned before a Military Judge. Her attorney plans to challenge jurisdiction in a motion to dismiss.

Enter Lieutenant (LT) Timm Wotley. He graduated from a prestigious northeastern dental school nearly one year ago. Unfortunately, he failed his licensing exam twice and cannot practice. Heartbroken, his passion for dentistry remains high. He wants nothing more than to prove to the world — and himself — that he can practice his craft. After reviewing the Navy's recruiting website, he learns that he needs a Doctorate of Dental Surgery or a Doctorate of Dental Medicine as well as an active license to practice dentistry in the Navy. Timm is distraught, so he decides to take a shortcut. Rather than making another attempt at passing his licensing exam, he simply lies to his recruiter and fraudulently represents that he is licensed to practice. He further represents that he is certified with the American Board of General Dentistry. Upon submission of forged documents attesting to the same and a completed application for commissioning, he is given the green light for five weeks of Officer

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<sup>55</sup> See *United States v. Kuemmerle*, 67 M.J. 141 (C.A.A.F. 2009).

<sup>56</sup> These hypothetical scenarios are entirely fictional and are not based on any real individual or circumstances. Any similarities between these scenarios and any real person or circumstance are purely coincidental.

Development School in Newport, Rhode Island. He graduates, and the future looks bright for newly minted LT Wotley. Or so it seems.

While practicing at his first duty station, LT Wotley's command learns that he never obtained a license to practice dentistry. They also learn that his certification with the American Board of General Dentistry is nothing more than a grand yarn. In short, he is exposed. Like SN Greene, LT Wotley is charged with violating Article 83. He, too, awaits trial in the weeks ahead, and his attorney also plans to challenge jurisdiction in his case.

Having laid two hypothetical fact patterns — one dealing with concealment, the other with affirmative misrepresentation — it is now appropriate to apply the accurate status of the law.

#### B. Applying *Kuemmerle* to SN Greene and LT Wotley

SN Greene is accused of deliberately concealing the fact that she suffers from a non-waivable medical condition that renders her unsuitable for military service when she filled out her pre-enlistment medical questionnaire.<sup>57</sup> As a result of that deliberate concealment, SN Greene was able to enlist and consequently receives pay and allowances.

As for LT Wotley, it is alleged that he made certain knowing affirmative misrepresentations about his license and board certification that enabled him to procure an appointment as a Naval officer. Like SN Greene, he receives pay and allowances. Though the facts differ slightly between SN Greene and LT Wotley, both servicemembers knowingly made certain false representations that enabled them to sign their contracts with the Navy. Given the ordinary sequence of events, it is beyond dispute that their representations necessarily occurred prior to coming on active duty. These representations are similar to the initial posting of the pornographic image in *Kuemmerle*.<sup>58</sup>

Unlike the sustained posting in *Kuemmerle*, however, the alleged false representations in the hypothetical cases were both made and completed in their entirety prior to SN Greene and LT Wotley entering active duty.<sup>59</sup> In the case of

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<sup>57</sup> DD FORM 2807-1, “Report of Medical History,” is used by all services. Its stated purpose is “[t]o assist DoD physicians in making determinations as to acceptability of applicants for military service and verifies disqualifying medical conditions . . . .” U.S. Dep’t of Def., DD Form 2807-1, Report of Medical History (Aug. 2011).

<sup>58</sup> See *supra* notes 27-33 and accompanying text.

<sup>59</sup> *Id.*

SN Greene, that deliberate concealment was complete when she filled out and signed her DD Form 2807-1. In the case of LT Wotley, that knowing misrepresentation was complete when he filled out and signed his application for commission.<sup>60</sup> Neither individual had raised his or her right hand to take an oath at the time of the misrepresentation. It follows then that these representations were made and completed prior to SN Greene and LT Wotley being subject to the UCMJ.

To be sure, both SN Greene and LT Wotley failed to repudiate the misrepresentations every day they served. But the lack of repudiation in these cases is quite dissimilar to the failure to remove the images in *Kuemmerle*. In *Kuemmerle*, the appellant affirmatively accessed the webpage, had the ability to take down the image, but failed to do so.<sup>61</sup> Here, SN Greene and LT Wotley merely went about their service in the Navy, day after day. They neither reiterated their statements – or lack thereof – nor had the discrete opportunity to recant their statements made on pre-service application documents.<sup>62</sup> In either case, their “wrongful” acts are akin to false official statements under Article 107 of the UCMJ which are completed once made<sup>63</sup>. As SN Greene and LT Wotley were civilians when the alleged false representations were made, neither was “a member of the Armed Services at the time of the offense charged.”<sup>64</sup> Jurisdiction over both accused, therefore, is lacking.

The fourth element of Article 83 does not create jurisdiction here; it requires the accused to have “received pay or allowances or both.”<sup>65</sup> To be sure, receipt of pay and allowances occurs while a servicemember is on active duty and thus a member of “a regular component of the armed forces.”<sup>66</sup> But consistent with the rationale in *Kuemmerle*, the fact that one element occurred while on active duty is not enough to create jurisdiction for the whole offense.<sup>67</sup> If one element could establish jurisdiction, then the C.A.A.F. would have

<sup>60</sup> See U.S. Dep’t of Navy, NC Form 1132/2, Application for Commission in the U.S. Navy/U.S. Navy Reserve (May 2006).

<sup>61</sup> See *supra* notes 31-32 and accompanying text.

<sup>62</sup> Compare MCM, *supra* note 3, pt. IV, ¶31. with MCM, *supra* note 3, pt IV, ¶7.. Even if they did reiterate their misrepresentations while on active duty, the proper charge for such misrepresentations would be under Article 107, not Article 83. Under Article 83, it is expressly required that the statement be used to “obtain[ ] or procure[ ]” an “enlistment or appointment.” MCM, *supra* note 3, pt. IV, ¶7.b.(1). Such enlistment or appointment would have already been obtained by the time they hypothetically reiterated their statements on active duty, leaving the third element of Article 83 unfulfilled. See MCM, *supra* note 3, pt. IV, ¶7.b.(1)(c).

<sup>63</sup> MCM, *supra* note 3, pt. IV, ¶31.

<sup>64</sup> *Solorio v. United States*, 483 U.S. 435, 451 (1987).

<sup>65</sup> See UCMJ art 83 (2012).

<sup>66</sup> UCMJ art. 2(a)(1) (2012).

<sup>67</sup> See *supra* Section II.D.

rendered its decision in *Kuemmerle* immediately upon defining the term ‘distribution’ as consisting of a posting (initially occurring before enlistment) and delivery (occurring when the agent viewed the image, while the accused was on active duty). It did not.<sup>68</sup>

Instead, the C.A.A.F. found that the appellant’s affirmative decision to access his Yahoo! profile and not remove the images after entering active duty was “[s]ignificant[.]”<sup>69</sup> Thus, the act of maintaining the image on the internet constituted a separate posting of the image. This act, maintaining the image, occurred while the appellant was on active duty just as the delivery of the image to the agent occurred while the appellant was on active duty.<sup>70</sup> Because both elements of the offense occurred while the appellant was subject to the UCMJ, jurisdiction was present.

Had the appellant in *Kuemmerle* not accessed his *Yahoo!* profile while serving on active duty, the result of the case presumably would have been different. This assertion is no leap of logic; rather, it is the only rational way to interpret the opinion. Under that scenario, the facts would be strikingly similar to the alleged facts of the subject hypothetical cases. Delivery of the image to the agent, like the receipt of pay and allowances, would still have occurred while the accused in *Kuemmerle* was serving on active duty. But the act of posting the image, like the act of making an alleged false representation to procure an appointment or gain an enlistment, would have occurred prior to his entering active duty.<sup>71</sup> Based on the holding of *Kuemmerle*, jurisdiction in either scenario is lacking.<sup>72</sup>

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<sup>68</sup> See *supra* note 40 and accompanying text.

<sup>69</sup> United States v. Kuemmerle, 67 M.J. 141, 144 (C.A.A.F. 2009).

<sup>70</sup> See *supra* notes 42-42 and accompanying text.

<sup>71</sup> See *supra* notes 40-42 and accompanying text.

<sup>72</sup> But see United States v. Smith, No. 201100594, 2012 CCA LEXIS 908, at \*20-24 (N-M. Ct. Crim. App. Dec. 27, 2012). There, Panel Two of the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) minimized the holding of *Kuemmerle*. *Id.* at \*22. It opined, “*Kuemmerle* addresses only the narrow question whether the appellant in that case committed a distribution on a specified date after entering active duty.” *Id.* (citing *Kuemmerle*, 67 M.J. at 145). But this characterization of the question presented looks past the significant jurisdictional hurdle the C.A.A.F. confronted in *Kuemmerle*. There is no analysis, moreover, on the decisional issue of whether all elements of an offense must occur while a person is on active duty or subject to the UCMJ. For these reasons, *Smith* is unpersuasive. And in any event, it is not binding on practitioners before that court. See N-M CT. CRIM. APP. R. 18.2. The C.A.A.F. granted review of *Smith* and affirmed in a one page order. See United States v. Smith, USCA Dkt. No. 13-0233/NA, Order of May 17, 2013. It did so without ordering briefing or issuing a written opinion. *Id.* That summary order provides jurisdiction for review by the Supreme Court of the United States. See 28 U.S.C. 1259(3) (authorizing the Supreme Court to hear “[c]ases in which the Court of Appeals for the Armed Forces granted a petition for review under section 867(a)(3) of title 10.”).

Admittedly, the holding in *Kuemmerle* not only compels granting SN Greene's and LT Wotley's motions to dismiss for lack of jurisdiction. It also compels a ruling that Article 83 is unconstitutional in that it purports to create jurisdiction over a category of persons which lay outside the reach of Congress's regulatory powers under art. I, § 8, cl. 14 of the Constitution.<sup>73</sup> These persons are simply not in an active-duty status when the first element of the offense under Article 83 is complete. It is important to note, however, that this does not entirely eradicate Article 83. The following section discusses the parameters of *Kuemmerle* as it applies to Article 83.

## V. Limiting Principles and Practical Applications

Based on the rationale of *Kuemmerle*, persons who enter the military as a result of fraudulent enlistment or appointment cannot be tried by court-martial under Article 83. Persons already on active duty who fraudulently re-enlist would still be subject to court-martial jurisdiction under Article 83.<sup>74</sup> Under that scenario, a servicemember would already be subject to the UCMJ when the concealment or misrepresentation is made. In accordance with the MCM, the concealment or misrepresentation could form a basis for a charge under Article 83. A timely example might be a servicemember concealing a deployment-incurred medical condition in order to re-enlist and remain on active duty. *United States v. LaRue*<sup>75</sup> provides another example. In *LaRue*, a servicemember re-enlisted multiple times under various aliases in order to obtain multiple re-enlistment bonuses.<sup>76</sup> Under either example, both the fraudulent misrepresentations and the receipt of pay and allowances occurred while the servicemember was on active duty and therefore subject to court-martial jurisdiction.

Jurisdiction under Article 83 would also exist for those persons who fraudulently separate themselves from the armed services. In those cases, the misrepresentation to obtain a separation occurs when the servicemember is on

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<sup>73</sup> See *supra* note 4 and accompanying text.

<sup>74</sup> See, e.g., *United States v. LaRue*, 29 C.M.R. 286, 290 (C.M.A. 1960) (holding “the fair meaning” of Article 83 applies to servicemembers who, by making knowingly false representations, fraudulently re-enlist in the armed services).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 287. Notably, the United States Court of Military Appeals in *LaRue* also discussed the “respectable authority” that opined fraudulent enlistment was not triable by court-martial because “the misrepresentations were made prior to the time the person was subject to military law.” *Id.* at 289 (observing this “view changed when Congress made the receipt of pay and allowances an element of the offense[ ]” in 1892) (citing WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 733 (2d ed. 1933 reprint)). Of course, this changed view predates the recent C.A.A.F. decision in *Kuemmerle*.

active duty and therefore subject to court-martial jurisdiction.<sup>77</sup> In *Wickham v. Hall*,<sup>78</sup> a servicemember feigned pregnancy to separate from the Army.<sup>79</sup> Jurisdiction was present to try her because she made the affirmative misrepresentation to enable separation while she was on active duty.<sup>80</sup> As reasoned by the United States Court of Military Appeals, “[t]he service member may merge with the civilian populace, but the fraudulent character of his separation exists and it binds him to the military community.”<sup>81</sup>

The point of these examples is to show that Article 83 is still relevant in light of *Kuemmerle*. Convening authorities may still refer charges to courts-martial for servicemembers alleged to have fraudulently re-enlisted or fraudulently separated.<sup>82</sup> As for fraudulent enlistment or fraudulent appointment, commands may still initiate administrative separation proceedings; they are merely foreclosed from charging that alleged misconduct in a court-martial forum. Thus, sufficient mechanisms already exist for each of the services to rid themselves of these individuals.

For example, the Naval Military Personnel Manual states that “[m]embers may be separated for effecting a fraudulent enlistment, induction, or period of service by falsely representing or deliberately concealing any qualifications or disqualifications prescribed by law, regulation, or orders.”<sup>83</sup>

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<sup>77</sup> See *Wickham v. Hall*, 12 M.J. 145, 150 (C.M.A. 1981) (holding “[s]eparation procured by fraudulent means is not a valid separation.”).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 146-47.

<sup>80</sup> Notably, these facts satisfy both jurisdictional tests. A misrepresentation, whatever the subject, in furtherance of a plan to separate from the armed services clearly passes the service-connection test of *O'Callahan*. Further, because the misrepresentation occurred while on active duty, the status of the accused test is also satisfied under *Solorio*. See *supra* notes 19-24 and accompanying text.

<sup>81</sup> *Wickham*, 12 M.J. at 150.

<sup>82</sup> Few would contest the subject provision’s severability from Article 83 and the UCMJ. The Eleventh Circuit Court of Appeals recently articulated the “well-established” test for severability, stating, “Unless it is *evident* that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is *fully operative as a law*.” *Florida ex. rel. Att'y Gen. v. United States Dep't of Health & Human Servs.*, 648 F.3d 1235, 1321 (11th Cir. 2011) (quoting *Alaska Airlines Inc. v. Brock*, 480 U.S. 678, 684, (1987)). This test operates alongside a presumption of severability. See *Florida*, 648 F.3d at 1321 (citing *Regan v. Time, Inc.*, 468 U.S. 641, 653, (1984)). Here, the non-severed portions of Article 83 and the UCMJ writ large remain fully operative as a law. They neither depend nor are supported by the narrow category of civilian-to-servicemember fraudulent appointees detailed in the subject provision. In other words, the remaining portions of the statute can stand despite the excision of this portion of the statute. This conclusion is only buttressed by the presumption cited above.

<sup>83</sup> U.S. DEP’T OF NAVY, NAVAL MILITARY PERSONNEL MANUAL 1910-134 (10 Nov. 2009).

The Secretary of the Navy promulgated a similar instruction that deals with officers:

Officers who do not maintain required standards of performance or professional or personal conduct may be processed for separation for cause per this instruction when there is reason to believe that one or more of the following circumstances exist.

...

Fraudulent entry into an Armed Force or the fraudulent procurement of commission or warrant as an officer in an Armed Force.<sup>84</sup>

The Marine Corps has a similar provision in its Marine Corps Separation and Retirement Manual. Marine Corps Separation and Retirement Manual, Section 6204 provides:

Marines who procure a fraudulent enlistment, reenlistment, induction, or period of active service will be processed for separation unless the fraud is waived or the fraud no longer exists. An enlistment, induction, or period of service is fraudulent when there has been deliberate material misrepresentation, including the omission or concealment of facts which, if known at the time, would have reasonably been expected to preclude, postpone, or otherwise affect the Marine's eligibility for enlistment or induction.<sup>85</sup>

Should the Service Secretaries and Congress determine that the existing option of an administrative separation with the possibility of an Other than Honorable (OTH) discharge provides an insufficient disincentive for fraudulent entry, a potential remedy could exist outside Title 10 of the United States Code.

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<sup>84</sup> U.S. DEP'T OF NAVY, SECNAVINST 1920.6C, ADMINISTRATIVE SEPARATION OF OFFICERS encl (3) 1-2 (15 Dec. 2005).

<sup>85</sup> U.S. MARINE CORPS, ORDER P1900.16F, MARINE CORPS SEPARATION AND RETIREMENT MANUAL, para. 6204.3a (6 June 2007). The Army and Air Force have equally forceful provisions in their separation publications. See, e.g., U.S. DEP'T OF ARMY, REG. 135-178, ARMY NATIONAL GUARD AND ARMY RESERVE: ENLISTED SEPARATIONS (13 Mar. 2007); U.S. DEP'T OF ARMY, REG. 135-175, SEPARATION OF OFFICERS (28 Feb. 1987) (addressing separation of officers for "fraudulent entry"); U.S. DEP'T OF AIR FORCE, INSTR. 36-3208, ADMINISTRATIVE SEPARATION OF AIRMEN (19 Oct. 2011) (addressing separation of enlisted servicemembers for "fraudulent entry").

A convening authority, for example, might notify the local U.S. Attorney's Office of a particularly egregious case of fraudulent entry. Just because jurisdiction is not present to try such cases by courts-martial does not mean that such cases cannot be tried in federal district court. Current statutes already criminalize individual cases of fraud against the United States,<sup>86</sup> providing an alternative venue where there is no jurisdiction for courts-martial.<sup>87</sup> Such federal statutes leave convening authorities with the flexibility to recommend prosecution by the U.S. Attorney's Office and/or process the offender for administrative separation.

## VI. Conclusion

There is no jurisdiction under Article 83 to try persons for fraudulent appointment or enlistment where such appointment or enlistment results in a change from civilian to servicemember status. In a series of decisions from 1866 to 1960, the Supreme Court held that the proper exercise of court-martial jurisdiction relies solely on the military status of the accused. Though this jurisdictional analysis changed for a brief period with *O'Callahan*, the Court restored the status-based test for jurisdiction in *Solorio*. *Kuemmerle* not only affirmed the status-based test, but it plainly suggested that unless *every element* of an offense occurs while the accused is on active duty, the military lacks court-martial jurisdiction.<sup>88</sup> When that analysis is applied to Article 83, it is evident that jurisdiction is lacking to try the civilian-to-service member category of persons. And despite the best efforts of Congress, the receipt of pay and allowances does not establish jurisdiction.

All is not lost, however. Persons already on active duty who fraudulently re-enlist are still subject to court-martial jurisdiction under Article 83. Jurisdiction also exists for those persons who fraudulently separate themselves from the armed services. Furthermore, just because jurisdiction is not present to try such cases by courts-martial does not mean that such cases can never be tried in federal district court. If federal district court is not an option, then sufficient mechanisms already exist for each of the services to administratively separate these individuals.

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<sup>86</sup> See 18 U.S.C. § 1001 *et seq.*

<sup>87</sup> Cf. MCM, *supra* note 3, ¶58. Article 132, "Frauds Against the United States," suffers from the same jurisdictional defect as Article 83, in that it cannot apply to civilians who fraudulently enter the armed services. Accordingly, it cannot serve as a substitute.

<sup>88</sup> See *United States v. Kuemmerle*, 67 M.J. 141 (C.A.A.F. 2009).

# DOES IT ADD UP? ANALYZING THE USE OF EXTRAPOLATION CALCULATIONS TO DETERMINE THE ABILITY TO CONSENT IN ALCOHOL-RELATED SEXUAL ASSAULT CASES

Commander Thomas P. Belsky, JAGC, USN\*

## I. Introduction

As military justice practitioners know all too well, one of the more difficult cases to prosecute or defend against at court-martial is an allegation of sexual assault involving alcohol. Aside from the lack of third-party eyewitnesses to the encounter and the participants' often foggy memories of the circumstances surrounding the incident, the problem is further exacerbated by the elusive statutory language defining when an intoxicated victim<sup>1</sup> is so drunk that sexual activity constitutes a criminal offense. In general, there is no bright-line test for determining how much alcohol inhibits a person's ability to consent,<sup>2</sup> and the military's current standard, consistent with the statutes in several states, merely prohibits sexual activity with someone who is "incapable of consenting" due to "impairment by any drug, intoxicant, or other similar substance."<sup>3</sup> In recent years, in an effort to provide some degree of context and substance to members interpreting the terms defining sexual assault, prosecutors and defense counsel have increasingly employed the use of expert testimony

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\* The author is a Reserve officer in the U.S. Navy Judge Advocate General's Corps. He is currently the Executive Officer of the Naval Justice School Reserve Unit and is a former trial counsel and appellate defense counsel.

<sup>1</sup> For clarity's sake and ease of identification, this article will refer to an alleged victim or complaining witness of an alleged sexual assault simply as "victim," although it is more accurate and appropriate to use either of the aforementioned terms.

<sup>2</sup> Ilene Seidman & Susan Vickers, *Beyond Prosecution: Sexual Assault Victim's Rights in Theory and Practice Symposium: The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 486 (2005).

<sup>3</sup> UCMJ art. 120 (2012) (*emphasis added*). This version of the statute became effective in June 2012. Before this change, the definition of sexual assault was equally elusive, prohibiting sexual activity with someone who was "substantially incapacitated" or "substantially incapable" of, among other things, "appraising the nature of the sexual act." UCMJ art. 120 (2008).

regarding alcohol extrapolation to either prove or dispute that the victim was “incapable of consenting.”<sup>4</sup>

Alcohol extrapolation<sup>5</sup> is a controversial mathematical process that uses circumstantial evidence to estimate a person’s blood alcohol content (BAC) at a particular point in time.<sup>6</sup> Because of its scientific underpinnings, extrapolation evidence must be elicited from an expert witness (usually a toxicologist). As with any expert testimony, this seemingly objective evidence, and its scientific foundations, can have a profound impact on the members and play a crucial role in the outcome of the case.<sup>7</sup> Extrapolation evidence demonstrating that the complaining witness could not have been as drunk as she or the prosecution claims can provide an “objective” scientific basis for the members to accept the defense argument. Conversely, the prosecution’s use of extrapolation evidence can help demonstrate that the victim was indeed “incapable of consenting,” even where the defense may have successfully attacked the victim’s credibility or called into question other evidence about the amount of alcohol the victim consumed prior to the encounter.

Despite the significant role this evidence can play in sexual assault cases, there are no published cases of counsel invoking the military judge’s role as the “gatekeeper” regarding expert testimony and challenging the admissibility of extrapolation evidence to prove a victim’s state of intoxication at the time of an alleged sexual assault.<sup>8</sup> While a few unpublished opinions from the Navy-Marine Corps Court of Criminal Appeals indicate that such evidence has been presented at trial, the admissibility of the evidence was neither challenged before the military judge nor raised as an issue before the appellate court.<sup>9</sup> In fact, as of

<sup>4</sup> See United States v. Collins, No. 201000020, 2011 CCA LEXIS 22, at \*6-7 (N-M. Ct. Crim. App. Feb. 17, 2011) (unpublished); United States v. Lamb, No. 201000044, 2010 CCA LEXIS 334, at \*5-6 (N-M. Ct. Crim. App. Sep. 21, 2010) (unpublished).

<sup>5</sup> Alcohol extrapolation is often called *retrograde* extrapolation because it usually takes post-incident data, such as a blood-alcohol-content (BAC) test, and “works backward” to estimate a person’s BAC at the time of the incident. See Kimberly S. Keller, *Sobering Up Daubert: Recent Issues Arising in Alcohol-Related Expert Testimony*, 46 S. TEX. L. REV. 111, 121 (2004).

<sup>6</sup> *Id.* at 122-24.

<sup>7</sup> See generally United States v. Frazier, 387 F.3d 1244, 1263 (11th Cir. 2004) (“[E]xpert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead or confuse.”); United States v. Hines, 55 F. Supp. 2d 62, 64 (D. Mass. 1999) (“[A] certain patina attaches to an expert’s testimony unlike any other witness; this is ‘science,’ a professional’s judgment, the jury may think, and give more credence to the testimony than it may deserve.”).

<sup>8</sup> See United States v. Sanchez, 65 M.J. 145, 149 (C.A.A.F. 2007) (citing *Daubert v. Merrell Dow Pharm, Inc.*, 509 U.S. 579, 589, 597 (1993)) (explaining that at court-martial, a military judge is a “gatekeeper . . . ensuring that an expert’s testimony both rests on a reliable foundation and is relevant”)

<sup>9</sup> See cases cited *supra* note 4.

this writing, there were no military appellate cases specifically addressing the admissibility of extrapolation evidence in sexual assault cases under the Military Rules of Evidence. In light of this dearth of detailed analysis concerning the admissibility of extrapolation evidence in sexual assault cases, and given how influential expert testimony can be with a jury, the goal of this article is to encourage counsel to vigorously litigate the admissibility of such evidence pretrial.

Part II of this article provides a brief history of alcohol extrapolation and discusses the scientific principles underlying the concept. Part III reviews the military's standards concerning the admissibility of expert evidence in general, analyzes several civilian cases addressing the admissibility of extrapolation evidence under similar rules regarding expert testimony, and identifies and discusses the arguments relevant to litigating the admissibility of extrapolation evidence at trial.

## II. The Science and Principles Underlying Extrapolation Evidence

A thorough discussion of the issues surrounding the admissibility of extrapolation evidence first requires an understanding of the scientific principles underlying the concepts. At its most basic, alcohol extrapolation attempts to estimate a person's BAC at a particular point in time using several numeric variables, including the total amount of alcohol the person consumed, the period of time over which consumption took place, and the length of time between the last drink and the moment in question.<sup>10</sup> Extrapolation calculations also attempt to account for a number of circumstantial and metabolic variables regarding a person's ingestion of alcohol, such as the type of alcohol ingested, the amount of food in the person's stomach, the person's weight, and his or her alcohol consumption history.<sup>11</sup> Because the speed with which the body processes and eliminates alcohol plays a crucial role in the accuracy of extrapolation calculations, it is helpful to review the principles associated with alcohol absorption and elimination.

### A. Alcohol Absorption

Alcohol, after it is ingested, is absorbed into the bloodstream through the walls of either the stomach or the small intestines.<sup>12</sup> Once absorbed, the

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<sup>10</sup> State v. Eighth Judicial Dist. Ct. of Nev., 267 P.3d 777, 780 (Nev. 2011).

<sup>11</sup> *Id.*; Keller, *supra* note 5, at 124.

<sup>12</sup> Jennifer L. Pariser, *In Vino Veritas: The Truth About Blood Alcohol Presumptions in State Drunk Driving Law*, 64 N.Y.U. L. REV. 141, 145-46 (1989).

alcohol is carried to the brain, at which point a person begins to feel and display the effects of alcohol intoxication — “the greater the alcohol content in the blood, the more extreme the effects experienced.”<sup>13</sup>

The rate at which alcohol is absorbed into the blood, and consequently the speed and degree to which a person becomes intoxicated, is based on a number of factors, including: (1) the presence and type of food in the stomach; (2) the individual’s gender, weight, and age; (3) the type and amount of beverage consumed; (4) the person’s tolerance for alcohol; and (5) the time passing between the first and last drink.<sup>14</sup> For example, a person who consumes alcohol on an empty stomach will absorb alcohol at a faster rate than an individual who consumes alcohol while or shortly after eating.<sup>15</sup> Depending on these variables, a person can absorb alcohol and feel its effects anywhere from fifteen minutes to six hours after ingestion of the last drink.<sup>16</sup> This period of time while a person is absorbing alcohol is generally called the absorption phase.<sup>17</sup>

## B. Alcohol Elimination

Soon after alcohol is absorbed into the bloodstream, the body begins to eliminate it.<sup>18</sup> This is generally referred to as the elimination, post-absorptive, or post-absorption phase.<sup>19</sup> Alcohol is eliminated from the body primarily through oxidation in the liver<sup>20</sup> and exhalation through the lungs or the passing of urine.<sup>21</sup> As with absorption, there are several factors that can affect the rate of alcohol elimination in a given person, including a person’s familiarity with alcohol and the number of alcoholic drinks involved.<sup>22</sup> Moreover, the processes of absorption and elimination are not mutually exclusive events, and there is often a significant period of time where the body is still absorbing alcohol recently consumed while eliminating alcohol already absorbed.<sup>23</sup> This progression of alcohol absorption and elimination is known as the BAC Curve,

<sup>13</sup> Keller, *supra* note 5, at 115.

<sup>14</sup> *Id.* at 124.

<sup>15</sup> Pariser, *supra* note 12, at 147.

<sup>16</sup> LAWRENCE TAYLOR & STEVEN OBERMAN, DRUNK DRIVING DEFENSE § 6.03, at 458 (7th ed. 2010).

<sup>17</sup> Keller, *supra* note 5, at 122.

<sup>18</sup> Henry J. Swofford, *Alcohol in the 21st Century: New Standards, New Technology*, FORENSIC, June/July 2009, at 23.

<sup>19</sup> J. Nicholas Bostic, *Alcohol-Related Offenses: Retrograde Extrapolation After Wager*, 79 MICH. B. J. 668, 670 (2000); See also Keller, *supra* note 5, at 122.

<sup>20</sup> Pariser, *supra* note 12, at 149.

<sup>21</sup> *Id.*

<sup>22</sup> TAYLOR, *supra* note 16, at 459-60.

<sup>23</sup> See Pariser, *supra* note 12, at 147.

and determining where a person falls on this continuum at a particular time can play a critical role in calculating a reliably accurate estimation of their BAC.<sup>24</sup>

### C. The Widmark Factors

In 1932, the Swedish chemist, E.M.P. Widmark, published his findings from studies concerning the rate at which the human body processes alcohol, and concluded that alcohol was eliminated from the body at an average of 0.015 g/100 mL per hour.<sup>25</sup> Widmark's studies also revealed that a person's body water content directly affected their absorption of alcohol as well as the amount of alcohol necessary to reach a specific BAC.<sup>26</sup> "In general, the heavier a person is, the greater the amount of alcohol that must be consumed to reach a specific alcohol concentration in the body."<sup>27</sup> Further, because men generally have significantly different body water content than women, regardless of body mass, men and women absorb alcohol at a different rate. Widmark's studies determined that the average body water distribution ratio is 0.68 for men and 0.55 for women.<sup>28</sup> These distribution ratios are known as Widmark's "r" factor.<sup>29</sup>

Based on the numbers identified from Widmark's studies, researchers have devised a number of different formulas for determining a person's peak BAC after consuming a particular amount of alcohol. One of the most widely accepted is:

$$\text{BAC}^{30} = (\text{alcohol}^{31} \text{ dose in grams} \times 100) / (\text{body weight in grams} \times \text{"r" factor}^{32})^{33}$$

Additionally, researchers have used Widmark's elimination rate of 0.015 per hour to extrapolate a person's BAC at an earlier time based on a subsequent

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<sup>24</sup> *Id.* at 147-49, 150-53 (using a hypothetical to demonstrate the accuracy of a BAC estimate).

<sup>25</sup> *Id.* at 152.

<sup>26</sup> AMERICAN PROSECUTORS RESEARCH INST., NAT'L DIST. ATTORNEYS ASS'N, ALCOHOL TOXICOLOGY FOR PROSECUTORS 14-15 (2003) [hereinafter TOXICOLOGY FOR PROSECUTORS].

<sup>27</sup> *Id.* at 15.

<sup>28</sup> TAYLOR, *supra* note 16, at 465; Swofford, *supra* note 18, at 24.

<sup>29</sup> TAYLOR, *supra* note 16, at 465.

<sup>30</sup> Throughout this article, the BAC unit is grams of alcohol per 100 milliliters of blood, which equates to grams of alcohol per 210 liters of breath.

<sup>31</sup> The dose must be measured in grams of pure alcohol; this requires knowing the alcohol content of a particular drink.

<sup>32</sup> Widmark's "r" factor in the equation is 0.68 for a male and 0.55 for a female.

<sup>33</sup> TOXICOLOGY FOR PROSECUTORS, *supra* note 26, at 16-17.

BAC determination.<sup>34</sup> This calculation, known as retrograde extrapolation, attempts to account for the amount of alcohol elimination that presumably occurred between the time in question and the time of the BAC determination.<sup>35</sup>

As one can see, extrapolation calculations using the Widmark factors are, at their most fundamental, deceptively simple exercises in arithmetic. However, a major limitation to extrapolation calculations is that they generally must *assume* that the subject is in the post-absorptive phase and completely in the process of eliminating alcohol from their body – an assumption that often does not apply and that is difficult if not impossible to confirm.<sup>36</sup> Because the body often eliminates alcohol at a slower rate than it absorbs it, a person may spend extended periods simultaneously absorbing and eliminating alcohol.<sup>37</sup> Thus, the person's BAC will continue to rise as long as he or she is in the absorptive phase.<sup>38</sup> In fact, it is impossible to definitively tell whether a person is in the absorptive or elimination phase of alcohol processing without the results of multiple BAC tests spaced apart in time confirming whether the person was ascending or descending the BAC Curve.<sup>39</sup> At some point either because the person has stopped drinking, or due to individual variables, the rates of absorption and elimination will equal.<sup>40</sup> This point in the process is where a person would exhibit the highest BAC.<sup>41</sup> After reaching this peak, a person's BAC will continue to decrease as the rate of elimination exceeds the rate of absorption.<sup>42</sup> A person's BAC will continually decline during this phase until all alcohol is eliminated from the body, or until the person starts consuming alcohol again, at which point the BAC will begin to increase again.<sup>43</sup> In order for extrapolation evidence to have its highest degree of accuracy, the expert performing the calculations must know whether the individual in question is in the absorptive or elimination phase and account for this fact in the calculations.<sup>44</sup>

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<sup>34</sup> Pariser, *supra* note 12, at 152.

<sup>35</sup> Keller, *supra* note 5, at 121 and accompanying text. This process is used often in drunk-driving cases where the suspect's BAC is obtained several hours after the traffic stop. For example, assume it was determined at 3:00 a.m. that the suspect's BAC was 0.07, but his traffic stop occurred at midnight. Inserting Widmark's elimination rate of 0.015 per hour into the following formula: Known BAC + (number of hours between time of BAC test and time of stop x 0.015) = BAC at time of stop. Law enforcement could extrapolate that the suspect's BAC was 0.12 at the time of the stop ( $0.07 + (3 \times 0.015) = 0.12$ ). TOXICOLOGY FOR PROSECUTORS, *supra* note 26 at 21.

<sup>36</sup> Pariser, *supra* note 12, at 149-53; TAYLOR, *supra* note 16, at 457-58.

<sup>37</sup> Pariser, *supra* note 12, at 149-53; TAYLOR, *supra* note 16, at 457-58.

<sup>38</sup> Pariser, *supra* note 12, at 149-53; TAYLOR, *supra* note 16, at 457-58.

<sup>39</sup> Pariser, *supra* note 12, at 152-53.

<sup>40</sup> Keller, *supra* note 5, at 121-22; Pariser, *supra* note 12, at 147.

<sup>41</sup> Keller, *supra* note 5, at 121-22; Pariser, *supra* note 12, at 147.

<sup>42</sup> Keller, *supra* note 5, at 121-22; Pariser, *supra* note 12, at 147.

<sup>43</sup> Keller, *supra* note 5, at 121-22; Pariser, *supra* note 12, at 147.

<sup>44</sup> Keller, *supra* note 5, at 121-22; Pariser, *supra* note 12, at 147.

### III. Issues Concerning the Admissibility of Extrapolation Evidence at Trial

As mentioned in Part I, counsel for both sides in alcohol-related sexual assault cases have been increasingly using extrapolation evidence to demonstrate a victim's capacity or incapacity to consent to the sexual activity in question, often without any objection from opposing counsel or effort to preclude its admission. Nevertheless, the introduction of this evidence, especially in the manner for which it is being offered, raises serious evidentiary questions. For example, no court, military or civilian, has yet addressed specifically whether the science and theory underlying extrapolation evidence are sufficiently established to allow for its admissibility at trial, especially for the unique purpose of demonstrating an individual's capacity to consent to sexual activity. Additionally, even if extrapolation evidence is deemed admissible for such purposes, there is still a question concerning how many of the factors relevant to an accurate calculation a witness must know in a particular case before his or her testimony is reliable enough for admission. The rest of this article will analyze these questions and highlight specific arguments in each instance.

#### A. Expert Evidence in General

Given that the principles involved in presenting extrapolation calculations at trial require the use of an expert witness, an examination of the admissibility of extrapolation evidence first requires a discussion of the issues relevant to the admissibility of expert testimony in general at a court-martial. Military Rules of Evidence (MRE) 702 and 703 regulate the admissibility of expert testimony at court-martial and serve as the foundation for an analysis of the admissibility of extrapolation evidence.<sup>45</sup> MRE 702, similar to its

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<sup>45</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 702 (2012) [hereinafter MCM] ("[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."); MCM, *supra* note 45, MIL. R. EVID. 703 (2012) ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert, at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the members by the proponent of the opinion or inference

counterpart in the Federal Rules of Evidence, reflects the United States Supreme Court's holdings in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>46</sup> and *Kumho Tire Co. v. Carmichael*<sup>47</sup> concerning expert witnesses.<sup>48</sup> These cases represent a substantial departure from the historical approach courts took towards expert testimony at trial following the decision in *Frye v. United States*,<sup>49</sup> which predicated admissibility of expert testimony on the scientific community's "general acceptance" of the principles underlying the proffered evidence.<sup>50</sup> *Daubert* and *Kumho Tire* explained that the Federal Rules of Evidence significantly lowered the bar for admissibility of expert testimony, eliminating the "general acceptance" standard and relying more on the adversarial process – namely, vigorous cross-examination and the presentation of rebuttal evidence – as the primary method for ensuring that "shaky but admissible evidence" does not factor into a jury's verdict.<sup>51</sup>

*Daubert*, *Kumho*, and the cases interpreting them also instruct trial judges to act simply as "gatekeepers" when it comes to expert testimony.<sup>52</sup> This responsibility does not require a judge to gather a "cosmic understanding" about the evidence at issue or even ensure to a particular degree of certainty the evidence's applicability and validity.<sup>53</sup> Instead, judges are required only to ensure that the reasoning and methodology underlying the evidence is reliable, that the principles are properly applied in the case at hand, and that the evidence is relevant to an issue of significance for the fact finder.<sup>54</sup> In short, the analysis is one of reliability and relevance: (1) whether the area of expertise is, as a matter of course, generally established enough to take it outside the moniker of "junk science;" (2) whether the expert properly applied the principles underlying the area of specialty in fashioning his or her opinions offered at trial; and (3) whether the evidence is useful to the fact finder in reaching a verdict.<sup>55</sup> Often, judges will perform these gatekeeping duties outside the presence of the jury in what are known as *Daubert* hearings.<sup>56</sup> In *United States v. Rodriguez*,<sup>57</sup> the

unless the military judge determines that their probative value in assisting the members to evaluate the expert's opinion substantially outweighs their prejudicial effect.").

<sup>46</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588-89, 596 (1993).

<sup>47</sup> *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 156-158 (1999).

<sup>48</sup> MCM, *supra* note 45, MIL. R. EVID. 702 analysis, at A22-51 to A22-52 (2012).

<sup>49</sup> *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

<sup>50</sup> *Id.*

<sup>51</sup> *Daubert*, 509 U.S. at 588-89, 596; *Kumho Tire Co.*, 526 U.S. at 147-149 (*Daubert* factors apply to scientific and non-scientific expert testimony).

<sup>52</sup> See, e.g., *United States v. Sanchez*, 65 M.J. 145, 149 (C.A.A.F. 2007).

<sup>53</sup> *Daubert*, 509 U.S. at 597.

<sup>54</sup> *Sanchez*, 65 M.J. at 149.

<sup>55</sup> *Id.* at 150.

<sup>56</sup> 4-702 Weinstein's Federal Evidence, § 702.02 (2011) ("Evidentiary hearings, known as *Daubert* hearings, are the most common method trial courts use to fulfill their gatekeeper function.").

Court of Military Appeals explicitly recognized the applicability of *Daubert* to the military, even though it had already been interpreting admissibility of expert evidence in this fashion for several years.<sup>58</sup>

### B. Extrapolation Evidence in General Under *Daubert*

Following *Daubert's* general framework and the military's approach to the analysis of expert evidence, there are several fundamental evidentiary questions concerning the admissibility of expert testimony on extrapolation evidence to prove a victim's mental state at the time of an alleged sexual assault: (1) whether there is a sufficient degree of acceptance in the scientific community to justify using extrapolation evidence to establish a person's ability to consent; (2) whether the use of extrapolation evidence in this manner requires an established BAC test as a foundation upon which to perform the calculations; (3) whether, in a specific case, there is enough known about the victim's consumption of alcohol and his or her individual variables to allow for a reliable calculation of an estimated BAC; and (4) whether the evidence, even if ultimately deemed reliable and relevant, possesses probative value that is substantially outweighed by the danger of unfair prejudice. In order to gain a foundational understanding of these issues, as well as to understand the basic approach courts have taken to the issue of extrapolation evidence under *Daubert* in general, it is helpful to review several civilian cases that have already addressed the admissibility of extrapolation calculations under *Daubert*, albeit in far different contexts.

While there is no documented appellate case, either military or civilian, addressing specifically the admissibility of extrapolation evidence to show a victim's mental state at the time of an alleged sexual assault, numerous civilian courts in so-called "*Daubert* jurisdictions" have addressed the evidence's admissibility in a variety of other contexts, mostly involving an issue of driving under the influence of alcohol (DUI), and the analyses applied in these cases will help identify some of the issues that will arise concerning the admissibility of the evidence in a sexual assault case.<sup>59</sup>

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<sup>57</sup> United States v. Rodriguez, 37 M.J. 448, 455 (C.M.A. 1993) (Crawford, J., concurring).

<sup>58</sup> 2 STEPHEN A. SALTBURG, MILITARY RULES OF EVIDENCE MANUAL § 702.02 (7th ed. 2012).

<sup>59</sup> It is important to recognize that several state jurisdictions still follow the so-called "Frye test" for admissibility of expert evidence at trial. *See generally* State v. Dixon, 822 N.W.2d 664, 671 (Minn. Ct. App. 2012); United States v. Jenkins, 887 A.2d 1013, 1021 (D.C. 2005). Because holdings from such jurisdictions are inapplicable in *Daubert* jurisdictions, and because the military is a *Daubert* jurisdiction, this article takes care to only discuss cases from *Daubert* jurisdictions.

## 1. Cases Finding Extrapolation Evidence Inadmissible Under *Daubert*

One of the first courts to significantly consider the admissibility of extrapolation evidence under *Daubert* was the Court of Criminal Appeals of Texas in its *en banc* decision in *Mata v. State*.<sup>60</sup> The defendant in *Mata* was charged with DUI, and the state's primary evidence consisted of a BAC test taken more than two hours after the initial traffic stop combined with expert testimony using Widmark calculations and the known BAC to extrapolate the defendant's BAC at the time of the traffic stop.<sup>61</sup> Both at trial and on appeal, the defendant argued that admission of the expert testimony violated *Daubert* and Texas Evidence Rule 702.<sup>62</sup>

The *en banc* court of appeals framed the issue as whether the expert at trial "reliably applied the science of retrograde extrapolation," and began its analysis acknowledging the extreme division among the scientific community concerning the reliability of extrapolation evidence.<sup>63</sup> Despite this disagreement surrounding the scientific viability of extrapolation concepts and the Widmark ratios, the court concluded that "the science of retrograde extrapolation can be reliable in a given case."<sup>64</sup> However, the court also found that the expert in this particular case failed to adequately apply the science at trial.<sup>65</sup>

Examining the trial testimony, the court noted that the expert either contradicted himself on, or simply was unaware of, several factors significant to proper application of extrapolation concepts.<sup>66</sup> For example, the expert stated during his testimony that the absorptive phase of alcohol processing could not last longer than one hour.<sup>67</sup> But at another point, he stated the phase could last no longer than an hour and a half.<sup>68</sup> Still later, he stated that the phase could not last longer than two hours.<sup>69</sup> Additionally, the expert acknowledged that in performing his calculations he used an elimination rate as high as either 0.02 or 0.03, even though the accepted average elimination rate among the scientific

<sup>60</sup> *Mata v. State*, 46 S.W. 3d 902, 908-917 (Tex. Crim. App. 2001) (*en banc*).

<sup>61</sup> *Id.* at 904-05.

<sup>62</sup> *Id.* at 904, 907. Texas Rule of Evidence 702 is nearly identical in substance and interpretation as Federal and Military Rule of Evidence 702. *See id.* at 908. *See also id.* at 924 n.1 (Womack, J., dissenting).

<sup>63</sup> *Id.* at 910-12.

<sup>64</sup> *Id.* at 916.

<sup>65</sup> *Id.* at 914-15, 917.

<sup>66</sup> *Id.* at 914.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

community at the time was Widmark's rate of 0.015 per hour.<sup>70</sup> Finally, the expert conceded that he was not aware of several facts concerning the defendant's drinking on the night in question that were critical to accurate extrapolation calculations.<sup>71</sup> These facts included: the number of drinks the defendant had on the night in question, the type of drinks, the period of time over which the defendant consumed alcohol, the time of the last drink, whether the defendant had anything to eat during the period of drinking, and the defendant's weight.<sup>72</sup> Based on all these flaws in the expert's calculations, the Texas court concluded that the expert could not have reliably applied the extrapolation principles at trial and found that the trial court erred under *Daubert* and Rule 702 in admitting the evidence at trial.<sup>73</sup>

Consistent with the approach in *Mata*, the Supreme Court of New Mexico, in *State v. Downey*,<sup>74</sup> found that the trial court erred in permitting extrapolation evidence in a vehicular homicide case where the evidence was predicated on factual assumptions unsupported by the record.<sup>75</sup> The government in *Downey* sought to use Widmark calculations to extrapolate the defendant's BAC at the time of the accident, using the results of a BAC test given approximately six hours after the incident.<sup>76</sup> The government's expert based his calculations on three basic facts: (1) the time of the accident; (2) the time of the BAC test; and (3) the results of that test.<sup>77</sup> However, the record contained no evidence of facts that would have helped the expert determine whether the defendant was in the absorptive or elimination phase at the time of the BAC test; the expert performed his calculations under the *assumption* that the defendant was completely in the elimination phase of alcohol processing both at the time of the BAC test as well as at the time of the accident.<sup>78</sup>

The New Mexico Supreme Court explained that information regarding whether the defendant was in the pre- or post-absorption phase of alcohol processing "either at the time of the collision or at the time his BAC test was administered" was "critical to perform[ing] extrapolation calculations."<sup>79</sup> The court stated that knowing where the defendant was on the absorption/

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 915.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 917 (noting that "[e]ven scientists who find retrograde extrapolations reliable would require more known quantities than what [the expert] had in this case").

<sup>74</sup> *State v. Downey*, 195 P.3d 1244 (N.M. 2008).

<sup>75</sup> *Id.* at 1252-53.

<sup>76</sup> *Id.* at 1247-49.

<sup>77</sup> *Id.* at 1251.

<sup>78</sup> *Id.* at 1251, 1252.

<sup>79</sup> *Id.* at 1252.

elimination continuum would help the expert determine if the defendant's BAC at the time of the accident would have been higher or lower than at the time of the BAC blood draw several hours later.<sup>80</sup> Given that this information was missing, the court concluded that the expert "could not express a reasonably accurate conclusion" whether the defendant was intoxicated at the time of the accident.<sup>81</sup> Ultimately, the court found that because the expert's testimony did not "fit" the facts of the case, and amounted to nothing more than "guesswork" and "conjecture," the trial court erred in not excluding the evidence under *Daubert*.<sup>82</sup>

Likewise, in *Ames v. Rock Island Boat Club*,<sup>83</sup> a dram shop case naming several taverns as defendants,<sup>84</sup> the United States District Court for the Central District of Illinois precluded the plaintiffs from offering extrapolation evidence where the expert's calculations and testimony did not "reliably apply the theory to the facts at hand."<sup>85</sup> The plaintiffs in *Ames* attempted to use extrapolation evidence to show that a driver, who was involved in a fatal accident with the plaintiffs' relatives, was "visibly intoxicated or appeared intoxicated while a patron" before the accident at the various defendant taverns.<sup>86</sup> The defendants moved in limine, pursuant to *Daubert*, to preclude the evidence, arguing that the expert's opinions concerning the driver's appearance at each location would be speculative since he did not know how many drinks the driver had at each location.<sup>87</sup> The plaintiffs countered that the expert could indeed provide reliable opinions given that they were based on the driver's own sworn statements concerning what and where he drank on the night in question as well as the amount of money he spent on drinks at each location.<sup>88</sup>

The district court precluded the evidence, finding that the information known to the expert prevented him from making reliable calculations to the degree necessary under *Daubert* in order to provide the proffered opinions.<sup>89</sup> In

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Ames v. Rock Island Boat Club*, No. 07-cv-4068, 2010 U.S. Dist. LEXIS 82539 (C.D. Ill. Aug. 10, 2010) (unpublished).

<sup>84</sup> A dram shop act "afford[s] a cause of action to persons injured in person, property, or means of support, by an intoxicated person or in consequence of the intoxication of any person, against the person who sold or furnished the liquor which caused the intoxication." Edward L. Raymond, Jr., Annotation, *Validity, construction, and effect of statute limiting amount recoverable in dram shop action*, 78 A.L.R.4th 542 (2008).

<sup>85</sup> *Ames*, 2010 U.S. Dist. LEXIS 82539, at \*15.

<sup>86</sup> *Id.* at \*6.

<sup>87</sup> *Id.* at \*7-8.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at \*14.

reaching this conclusion, the court noted that the expert only knew that the driver “had some number of drinks” at one location, had more drinks at another location, and 11 to 12 hours after leaving the first location had a BAC of 0.199.<sup>90</sup> The court explained that without more specificity regarding the circumstances surrounding the subject’s drinking, “it is just too big of a jump to say that a person was intoxicated 11-17 hours before testing with a given blood alcohol level when one only know [sic] what time he had [sic] first drink and his blood alcohol level 17 hours later.”<sup>91</sup> The court did note, however, that if the expert heard testimony from the driver at trial about the number of drinks he had at each location, “he will [then] have sufficient data on which to formulate a reliable opinion about [the driver’s] appearance and behavior at each dram shop,” and the evidence would become admissible.<sup>92</sup>

## 2. Cases Allowing Extrapolation Evidence Under *Daubert*

In contrast to cases like *Mata*, *Downey*, and *Ames*, other courts considering the admissibility of extrapolation evidence under *Daubert* have allowed such evidence, even where critical facts necessary for accurate calculations were absent, relying on the adversarial process to expose “shaky but admissible evidence.”<sup>93</sup> For example, in *United States v. Tsosie*,<sup>94</sup> an involuntary manslaughter case, the United States District Court for the District of New Mexico held that the government was permitted to introduce extrapolation evidence to estimate the defendant’s BAC at the time of a fatal crash despite the expert not knowing “what [the defendant] ate while he was drinking [alcohol] the night before the crash, exactly how much he drank, or over what time period he drank it.”<sup>95</sup> In allowing the evidence, the court in *Tsosie* explained that the expert’s calculations took into account both *known* and *unknown* facts about the defendant’s conduct leading up to the crash and gave the defendant the benefit of the doubt when those facts were unknown, using assumptions that favored the defendant concerning when he last ate and his drinking patterns.<sup>96</sup> The court concluded that any speculation on the expert’s part, including her important assumption that the defendant was completely in the elimination phase of alcohol processing at the time of the crash, went “to the weight, and not the admissibility, of the evidence.”<sup>97</sup>

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at \*14-15.

<sup>92</sup> *Id.* at \*15-16.

<sup>93</sup> *Daubert v. Merrell Dow Pharmas., Inc.*, 509 U.S. 579, 596 (1993).

<sup>94</sup> *United States v. Tsosie*, 791 F. Supp. 2d 1099 (D.N.M. 2011).

<sup>95</sup> *Id.* at 1110, 1112.

<sup>96</sup> *Id.* at 1112, 1114.

<sup>97</sup> *Id.* at 1116 (quoting *Wallis v. Carco Carriage Corp., Inc.*, No. 95-7176, 1997 U.S. App. LEXIS 25309,, at \*22 (10th Cir. 1997) (unpublished)).

Additionally, in *Shea v. Royal Enterprises, Inc.*,<sup>98</sup> the United States District Court for the Southern District of New York relied heavily on operation of the adversarial process to reject the plaintiff's objections to the defendant's use of extrapolation evidence to show that it was the plaintiff's intoxication, rather than the defendant's negligence, that caused the plaintiff's injuries. In an effort to preclude the evidence, the plaintiff argued that the calculations of the defendant's expert: (1) were not based on a post-incident BAC test as is traditionally the case; (2) failed to accurately reflect the effect of the food the plaintiff ate; (3) employed an unreasonably low elimination rate; and (4) used a relatively low "r" factor.<sup>99</sup> To all of these objections, the district court repeatedly explained that these concerns went to the *weight* of the evidence rather than its admissibility, and that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."<sup>100</sup> Additionally, the court noted that the expert possessed many facts necessary for performing reliable extrapolation calculations, including: a reasonable approximation of the amount and type of alcohol the plaintiff drank on the night in question; the amount of time he was drinking; and what he ate during the time in question.<sup>101</sup> All these facts, the court concluded, rendered the evidence admissible under *Daubert*.

Finally, in *Weinstein v. Siemens*,<sup>102</sup> the United States District Court for the Eastern District of Michigan relied on the adversarial process in allowing the plaintiff to introduce extrapolation evidence in a wrongful death case stemming from an automobile accident where the defendant's employee was driving while intoxicated.<sup>103</sup> The plaintiff in *Weinstein* sought to introduce an expert who would conduct Widmark calculations based on the employee's BAC obtained several hours after the accident to extrapolate the employee's BAC at the time of the accident and explain the behaviors and characteristics exhibited by the typical person with that BAC.<sup>104</sup> The defendant objected to this testimony on two grounds: (1) that the expert did not know whether, at the time of the accident, the employee was in the absorptive or elimination phase of alcohol processing; and (2) that the behaviors and characteristics the expert associated

<sup>98</sup> *Shea v. Royal Enterprises, Inc.*, No. 09 Civ. 8709 (THK), 2011 U.S. Dist. LEXIS 63763 (S.D.N.Y. June 16, 2011) (unpublished).

<sup>99</sup> *Id.* at \*7-9.

<sup>100</sup> *Id.* at \*15 (quoting *Daubert v. Merrell Dow Pharmas., Inc.*, 509 U.S. 579, 596 (1993)).

<sup>101</sup> *Id.* at \*8-9.

<sup>102</sup> *Weinstein v. Siemens*, No. 2:07-CV-15000, 2010 U.S. Dist. LEXIS 123546 (E.D. Mich. Nov. 22, 2010) (unpublished).

<sup>103</sup> *Id.* at \*3-4.

<sup>104</sup> *Id.* at \*7-8.

with the extrapolated BAC were inaccurate.<sup>105</sup> On both these points the district court explained that these concerns went to the *weight* of the evidence, not its admissibility, and that the defendant was free to address these concerns through cross-examination of the plaintiff's witness or through presentation of their own expert witness.<sup>106</sup> Thus, the court concluded that the evidence was admissible under *Daubert*.<sup>107</sup>

The court did, however, preclude the plaintiff's expert from testifying as to the employee's signs of intoxication before he left the defendant's office on the day of the accident because the expert did not have information as to when the employee drank alcohol on the day in question.<sup>108</sup> The expert admitted that it was possible, based on the extrapolated BAC and the time of the accident, that the employee did not start drinking alcohol until *after* he left the defendant's office, and therefore would not have exhibited any signs of intoxication before leaving the office.<sup>109</sup> The court concluded that to allow the expert to testify on such possibilities would amount to "pure speculation," and would "simply contain . . . too many 'speculative jumps' in the chain of events to render [the] opinion reliable or helpful to the jury."<sup>110</sup>

### C. Admissibility Under *Daubert* of Extrapolation Evidence to Demonstrate Capacity to Consent in Alcohol-Related Sexual Assault Cases

The civilian cases just discussed reveal that courts, while generally inclined to accept the underlying science of extrapolation calculations as reliable enough for its introduction through expert testimony under *Daubert*, are split on the admissibility of the evidence in particular cases based on the facts known in the given case and the purpose for which counsel seek to use the evidence. It is also important to note that none of these cases discussed the admissibility of extrapolation evidence to establish a victim's capacity to consent in a sexual assault case. Thus, these cases, while extremely useful as persuasive authority for highlighting the issues concerning the admissibility of extrapolation evidence under *Daubert* in general, do not help resolve the specific issue that is the focus of this article: whether it is permissible under *Daubert* to introduce extrapolation evidence in an alcohol-related sexual assault case to demonstrate a victim's capacity or incapacity to consent to the sexual activity in question.

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<sup>105</sup> *Id.* at \*8 n.2, 13.

<sup>106</sup> *Id.* at \*19-20.

<sup>107</sup> *Id.* at \*20-21.

<sup>108</sup> *Id.* at \*22.

<sup>109</sup> *Id.* at \*22-23.

<sup>110</sup> *Id.* at \*23-24.

### 1. Whether There is Sufficient Acceptance in the Scientific Community to Permit the Use of Extrapolation Evidence to Establish a Victim's Ability to Consent

A fundamental question counsel should raise when opposing counsel attempts to use extrapolation evidence to establish a victim's mental state in a sexual assault case is whether, as a matter of law, the evidence is admissible for the proffered purpose. Counsel should require the military judge, as gatekeeper, to determine whether the proffered use of the evidence is sufficiently established in the scientific community and therefore "reliable" under *Daubert*. In raising this issue, counsel should also argue that the aforementioned cases finding extrapolation evidence generally admissible in the DUI setting are inapplicable to this analysis given the fundamentally different focus of the two types of cases (a finite BAC in the DUI case compared to the abstract concept of one's ability to consent in the sexual assault case).<sup>111</sup>

In *Daubert*, the Supreme Court articulated a non-exhaustive list of factors a trial court "may use to determine the reliability of expert testimony."<sup>112</sup> These factors are: (1) whether a theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error in using a particular scientific technique and the standards controlling the technique's operation; and (4) whether the theory or technique has been generally accepted in the particular scientific field.<sup>113</sup>

With regard to extrapolation evidence, there is no available data to support its use to establish a sexual assault victim's capacity to consent. A

<sup>111</sup> It should also be noted that there is a larger question at issue in this context – namely, whether even a known (versus estimated) BAC is admissible regarding one's capacity to consent. Nevertheless, this question is beyond the scope of this article as such a question necessarily requires a discussion of the varying ways courts address BAC and consent in cases involving, among other things, consent to search one's property, implied consent to a blood draw in DUI cases, and voluntary intoxication to negate specific intent. Compare *United States v. Jameson*, 65 M.J. 160, 164 (C.A.A.F. 2007) (stating in a consent-to-search case that "[w]e decline to hold as a matter of law that Appellant was incapable of consenting because he had a BAC of .11"), with *People v. Popoca*, 615 N.E.2d 778, 784-86 (Ill. App. Ct. 2d Dist. 2003) (holding, in the context of a voluntary-intoxication defense, that defense counsel was ineffective for failing to call an expert witness to put into context for the jury the defendant's post-offense BAC of 0.20). Suffice it to say, whether a victim's extrapolated BAC estimate is admissible in a sexual assault case is an open question counsel should litigate.

<sup>112</sup> *United States v. Sanchez*, 65 M.J. 145, 149 (C.A.A.F. 2007) (emphasis in original) (citing *Daubert v. Merrell Dow Pharmas., Inc.*, 509 U.S. 579, 593-594 (1993)).

<sup>113</sup> *Daubert*, 509 U.S. at 593-94.

search of available resources fails to reveal any tests or studies purporting to correlate a particular BAC established via extrapolation calculations with a person's ability to consent, and there are no scientific publications advocating the use of extrapolation evidence in such a manner. This lack of any scientific data supporting the use of extrapolation evidence to establish an ability to consent fails *Daubert*'s standards for reliability.

It is also important to distinguish the specific intent of extrapolation evidence in a sexual assault case to prove capacity to consent from the cases discussing extrapolation evidence to simply establish a person's BAC in the DUI context. In the DUI setting, extrapolation evidence is extremely probative of the singular issue of whether the defendant, at a particular moment in time, had a BAC higher than a precise level permitted by law. In this sense, the crime is a strict liability offense in that the individual's level of impairment is irrelevant to guilt – the person's BAC is either above or below the legal limit. Given the nature of this question, accurate extrapolation evidence is virtually dispositive of the issue, even if the calculations might have a fairly wide margin of error, so long as the expert properly applied the calculations and the underlying principles to the known facts. For example, if a state law prohibits operating a motor vehicle with a BAC of 0.08 or greater, extrapolation evidence that a subject had a BAC in a range as broad as 0.10 to 0.175 would still be probative and probably admissible despite its lack of specificity because it can still demonstrate that the subject's BAC was 0.08 or greater.

This same evidence, however, is not as probative in a sexual assault case where the fundamental question is the more abstract issue of whether the victim, at the specific moment of the alleged assault, was "incapable of consenting."<sup>114</sup> Moreover, because there is no bright line for determining when a person is "incapable of consenting,"<sup>115</sup> a BAC standing alone is not probative on the issue of consent unless it is accompanied by evidence that the particular BAC is usually accompanied by mental disabilities that would render a person incapable of consenting.<sup>116</sup> Therefore, there is a very real question whether

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<sup>114</sup> This issue is made even more complicated given that the Military Judge's Benchbook does not define for members the phrase "incapable of consenting," or give any guidance on the degree of "impairment" that would render someone "incapable of consenting." See generally U.S. DEP'T OF ARMY, Pam. 27-9, MILITARY JUDGES' BENCHBOOK, (05 July 2012).

<sup>115</sup> Christine Chambers Goodman, *Protecting the Party Girl: A New Approach for Evaluating Intoxicated Consent*, 2009 B.Y.U.L. REV. 57, 87 (2009).

<sup>116</sup> Thus, in addition to using extrapolation evidence to establish a victim's BAC, counsel would also need to offer evidence as to the characteristics associated with a particular BAC to infer the ability or inability to consent. See generally Teresa M. Scalzo, *Prosecuting Alcohol-Facilitated Sexual Assault*, 61 (American Prosecutors Research Institute, 2007) AMERICAN PROSECUTORS RESEARCH INST., NAT'L DIST. ATTORNEYS ASS'N, ALCOHOL TOXICOLOGY FOR PROSECUTORS 14-15 (2003)

extrapolation evidence in this context “will assist the trier of fact to understand the evidence or to determine a fact in issue”<sup>117</sup> under MRE 702, because even if the expert’s BAC estimate is accurate, the BAC cannot, by itself, establish that the person was or was not impaired, unless the estimate is at an extreme end of the BAC curve.<sup>118</sup> As no case has yet provided a fully developed record correlating a particular BAC with characteristics consistent with being incapacitated or incapable of consenting, it is unknown whether, as a matter of law, extrapolation evidence is admissible to demonstrate a victim’s mental state at the time of an alleged sexual assault.

## 2. Admissibility of Extrapolation in the Absence of a BAC Test

Another question counsel should ask when attempting to introduce or rebut extrapolation evidence at trial is whether there is a reliable BAC test from which a proposed expert can base their extrapolation calculations. Often, the victim of a sexual assault does not report the incident until much later, after they have completely processed the alcohol in their system, thereby rendering a BAC test useless. In such cases, instead of merely “working backwards” from an established BAC, an extrapolation expert would first need to generate an approximate BAC in the first instance, factoring in all the variables affecting

(providing sample questions for introducing expert testimony on intoxication). For example, in *United States v. Collins*, the government offered the testimony of a toxicologist who not only estimated the victim’s BAC at the time of the assault, but also testified as to the effects the victim would have experienced at this BAC. *United States v. Collins*, No. 201000020, 2011 CCA LEXIS 22, at \*6-7 (N.M. Ct. Crim. App. Feb. 17, 2011) (unpublished). Nevertheless, again, the admissibility of extrapolation evidence was not litigated at trial in *Collins*, nor raised on appeal, and therefore is not probative of the issues addressed in this article. The most famous, and most widely used, method of correlating characteristics with a particular BAC is Dr. Kurt Dubowski’s *Stages of Alcohol Intoxication*, a widely recognized resource in the field of toxicology and alcohol testing. Ironically, though, Dr. Dubowski is critical of using extrapolation calculations based on anything less than *multiple* BAC tests taken at different times. See Kurt M. Dubowski, *Absorption, Distribution, and Elimination of Alcohol: Highway Safety Aspects*, Supp. 10 JOURNAL OF STUDIES ON ALCOHOL 98, 106 (1985). Thus, counsel seeking the use of extrapolation evidence in the typical sexual assault case, which normally does not have a single BAC test result let alone multiple results, is faced with this Hobson’s Choice: either attempt to use the evidence standing alone, which generally is not admissible for establishing a victim’s ability or inability to consent, or offer the evidence in conjunction with Dr. Dubowski’s scale and undercut the reliability, if not admissibility, of extrapolation evidence based on Dr. Dubowski’s criticism of the theory.

<sup>117</sup> MCM, *supra* note 45, MIL. R. EVID. 702 (2012).

<sup>118</sup> For example, an estimated BAC of 0.31 (on the high end of the BAC curve) makes it more probative that the subject *was* impaired or incapacitated, just as an estimated BAC of 0.031 (on the low end of the BAC curve) makes it more probative that the subject *was not* impaired. Where the BAC estimate is not on either extreme end of the curve, it is less probative of impairment, even if the estimate can be made with accuracy.

alcohol absorption and elimination rates, including the type and amount of alcohol consumed, the period time between consumption and the incident in question, and the presence of food in the stomach.<sup>119</sup> The expert would then need to work from this initial BAC calculation to the time of the alleged assault to determine the BAC at the time of the encounter.

Given that the admissibility of expert testimony in *Daubert* jurisdictions depends greatly on the degree to which it is reliable, one can argue that the absence of an established BAC upon which an expert can base his or her calculations renders the calculations simply too speculative or unreliable to be admissible.<sup>120</sup> In fact, with the exception of the decision from the United States District Court for the Southern District of New York in the civil case of *Shea*, no other reported case has addressed, let alone admitted, extrapolation evidence in the absence of an established BAC test that can form the basis for the calculations. Thus, the lack of an established BAC test may be grounds to preclude the admissibility of extrapolation evidence and the Widmark calculations in a sexual assault case.

### 3. Sufficiency of Information Concerning the Victim and the Consumption of Alcohol

Counsel should also seek to exclude extrapolation evidence on the ground that there simply is not enough known about either the personal characteristics of the victim or the circumstances associated with the alcohol consumption to permit reliable calculations under *Daubert*. To this extent, this argument is similar to the arguments made in the DUI cases. For example, the more an expert must apply factors attributed to the “average” person (such as absorption and elimination rates) rather than to the specific person, and the more the expert must *assume* certain facts relevant to the extrapolation analysis (such as the number of drinks, the amount of food in the subject’s stomach, and the time drinking ceased), the stronger counsel can argue that extrapolation principles cannot “properly . . . be applied to the facts in issue,” and therefore such evidence is inadmissible under MRE 702.<sup>121</sup> As the drafters of the federal counterpart to MRE 702 state, “The more subjective and controversial the expert’s inquiry, the more likely the testimony should be excluded as unreliable.”<sup>122</sup> Indeed, while the military judge’s gatekeeping analysis with regards to expert testimony is flexible and must be tied to the specific facts of the case, there is a point where the proffered testimony “falls ‘outside the range

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<sup>119</sup> See *supra* Part II.A-B.

<sup>120</sup> See *supra* Part II.

<sup>121</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593 (1993).

<sup>122</sup> Fed. R. Evid. 702 advisory committee’s note.

where experts might reasonably differ,” and there is simply “too great an analytical gap” between the known facts and the reliability of the proffered testimony.<sup>123</sup>

The argument that extrapolation evidence is inadmissible is stronger in the absence of evidence that the subject was in either the absorptive or post-absorptive phase at the time of the BAC test.<sup>124</sup> A single BAC test cannot, without more, demonstrate whether the subject was still in the absorptive phase of alcohol processing, in which case their BAC would be *higher* at the time of testing than at the time of the incident, or in the post-absorptive or elimination phase of processing, in which case their BAC would be *lower* at the time of testing than at the time of the incident.<sup>125</sup> While an expert may, to a reasonable degree, estimate whether a person was in the absorptive or elimination phase based on the difference in time between the subject’s last drink and the BAC test,<sup>126</sup> extrapolation calculations necessarily *assume* the subject is completely in the elimination phase.<sup>127</sup> Because this assumption relates to a fact crucial for reliable extrapolation calculations,<sup>128</sup> counsel can argue that the assumption renders the calculations too unreliable to be admissible in a case where the assumption itself is not based on reliable evidence.

Counsel seeking to introduce extrapolation evidence at trial need to be mindful of these limitation on expert testimony and must work vigorously and early to gather as much information as possible both about the subject and the circumstances surrounding the drinking episode so that their expert can provide reliable extrapolation calculations. Likewise, counsel seeking to preclude extrapolation evidence need to highlight the limitations of the extrapolation analysis, bring to the military judge’s attention the cases mentioned in this article where courts have precluded extrapolation evidence under *Daubert*, and demonstrate with specificity how the information lacking in a particular case either about the personal characteristics of the victim or the circumstances

<sup>123</sup> United States v. Sanchez, 65 M.J. 145, 149, 150 (C.A.A.F. 2007) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153 (1999)).

<sup>124</sup> See Kenneth S. Broun, *McCormick on Evidence* § 205 (6th ed. 2009). See also *supra* notes 12-24 and accompanying text.

<sup>125</sup> See *supra* note 37 and accompanying text; Pariser, *supra* note 12, at 152 (“One problem with extrapolation calculations is that typically they are based on a single BAC test. Without additional tests, it is impossible to know whether that test was taken while the [subject’s] BAC was increasing or decreasing.”).

<sup>126</sup> State v. Eighth Judicial Dist. Ct. of Nev., 267 P.3d 777, 784-86 (Nev. 2011) (Pickering, J., dissenting).

<sup>127</sup> State v. Downey, 195 P.3d 1244, 1252 (N.M. 2008); see *supra* Part II.A-B.

<sup>128</sup> *Downey*, 195 P.3d at 1252; see *supra* Part II.

surrounding the drinking render any extrapolation evidence unreliable under *Daubert* and inadmissible under MIL. R. EVID. 702 and 703.

#### 4. Whether the Evidence's Probative Value is Substantially Outweighed by the Risk of Unfair Prejudice

Finally, even if a court were to determine that extrapolation evidence is reliable and relevant under MIL. R. EVID. 702 to establish a victim's mental state, there is still the argument that any probative value the evidence may possess could be substantially outweighed by unfair prejudice under MIL. R. EVID. 403.<sup>129</sup> Unlike the DUI scenario where the evidence is being used to help prove a concrete fact (whether the subject was or was not above a specific BAC level), extrapolation evidence in the sexual assault case is only useful where corresponding evidence puts the sterile BAC number in context for the fact finder regarding the subject's level of impairment or incapacitation. An expert's estimate of a specific BAC may invite the members to find that the victim was impaired or substantially incapacitated based simply on the shocking value of a BAC number rather than on a meaningful evaluation of all the evidence and a determination whether the person was truly impaired or incapacitated as defined by the law.<sup>130</sup>

Additionally, there is a strong argument that the primary information concerning a victim's ability to consent is not the BAC, but the physical signs of intoxication he or she exhibits.<sup>131</sup> In this sense, a BAC is even less probative of

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<sup>129</sup> MCM, *supra* note 44, MIL. R. EVID. 403 (2012) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

<sup>130</sup> MCM, *supra* note 44, MIL. R. EVID. 403 (2012). The term "unfair prejudice" in MRE 403 "means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Eighth Judicial Dist.*, 267 P.3d at 783 (holding that the trial court in a DUI case did not err when it precluded pursuant to the state equivalent of MRE 403 extrapolation evidence where the evidence was "insufficiently tethered to individual factors necessary to achieve a reliable calculation," and invited the jury to convict "based on emotion or an improper ground – that the defendant had a high blood alcohol level several hours later – rather than a meaningful evaluation of the evidence.").

<sup>131</sup> See generally Commonwealth v. Blache, 880 N.E.2d 736, 747 (Mass. 2008) (holding that an incapacity instruction was warranted where "witnesses who observed the complainant shortly before the alleged rape took place testified that she exhibited signs of extreme intoxication, including falling down, behaving combatively, driving into a fence and the side of a house, and 'pass[ing] out' for a period of time."); State v. Chaney, 5 P.3d 492, 498 (Kan. 2000) (holding there was sufficient evidence that the victim "was both psychologically and physiologically impaired due to the effects of alcohol" where witnesses testified that the victim had "significant difficulty both walking and talking . . . was tripping over objects and had bloodshot eyes and slurred speech.").

the victim's mental state, which makes the risk of it being outweighed by unfair prejudice all the greater. Given both the arguments discussed, there are very serious, and as of yet not litigated, questions as to whether extrapolation evidence is admissible in sexual assault cases in an effort to establish the victim's mental state at the time of the alleged assault.

#### IV. Conclusion

The power of an expert witness to influence a verdict at trial is well known.<sup>132</sup> As the Supreme Court plainly noted in *Daubert*, “[e]xpert evidence can be both powerful and quite misleading.”<sup>133</sup> Moreover, data indicates, despite *Daubert*'s faith in the adversarial process, that effective cross-examination and presentation of a countering expert may not easily undo the effects of misleading expert testimony.<sup>134</sup> For these reasons, counsel must always be particularly vigilant and vigorous in their efforts to prevent questionable or unreliable expert testimony from entering into trial.

This need for vigilance is particularly important when it comes to the admissibility of extrapolation evidence in the typical alcohol-related sexual assault allegation. As mentioned in the introduction, the lack of independent eyewitnesses often leaves members desperate for objective evidence to help them uncover the truth. The members will also often look for a concrete definition of what it means to be “incapable of consenting.” Consequently, they may look to extrapolation evidence to serve this purpose, and as the cases and issues discussed in this article demonstrate, there are numerous reasons why this evidence may be misleading. Only by invoking the military judge’s duty as gatekeeper, and subjecting the proposed evidence to the rigor of a *Daubert* hearing can counsel ensure that the evidence is admissible and, more importantly, that any verdict rests on reliable evidence.

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<sup>132</sup> See *supra* note 7.

<sup>133</sup> *Daubert v. Merrell Dow Pharmas., Inc.*, 509 U.S. 579, 595 (1993).

<sup>134</sup> Dawn McQuiston-Surrett & Michael J. Saks, *The Testimony of Forensic Identification Science: What Expert Witnesses Say and What Factfinders Hear*, 33 Law & Hum. Behav. 436, 451 (2009).

# USE OF HEARSAY IN MILITARY COMMISSIONS

Lieutenant Commander Arthur L. Gaston III\*

## I. Introduction

Trial by military commission has been described as an “extraordinary measure” in the annals of American jurisprudence.<sup>1</sup> In fact, such commissions and other military tribunals have been used repeatedly throughout U.S. history—over 2,000 times during the Civil War alone<sup>2</sup>—to maintain order during periods of hostilities, to enforce martial law, and to prosecute war crimes in defense of the Nation.<sup>3</sup> As explained by William Winthrop, who has been called the “Blackstone of Military Law,”<sup>4</sup> such commissions have functioned essentially as instrumentalities of the war powers vested in Congress and the President.<sup>5</sup> Thus, as tools of war, military commissions are in many ways no more or less extraordinary than their historical context, i.e., the armed conflicts in which Congress and the President have called them into service.

This article addresses one aspect of military commissions that has drawn criticism over the years: their more permissive approach to the consideration of hearsay evidence. In the Supreme Court’s decision in *Hamdan*

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\* Judge Advocate General’s Corps, United States Navy. J.D., Duke Law School, 2000; B.A., Davidson College, 1995. Formerly assigned as Trial Counsel, Office of Military Commissions, Department of Defense, 2008-2011; Staff Judge Advocate, Commander, Fleet Activities Okinawa and U.S. Naval Hospital, Okinawa, Japan, 2005-2008; and Defense Counsel, Naval Legal Service Office Sigonella, Sicily and Roosevelt Roads, Puerto Rico, 2001-2005. This article was submitted in connection with the author’s completion of an LL.M. in Litigation and Dispute Resolution at The George Washington University Law School, 2012. The opinions expressed herein are those of the author and do not necessarily represent the views of the U.S. Government, the Department of Defense, or the Department of the Navy. Special thanks to COL Francis Gilligan, USA JA (ret.), for his comments on an earlier draft.

<sup>1</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006) (citing *Ex parte Quirin*, 317 U.S. 1, 19 (1942)).

<sup>2</sup> *In re Yamashita*, 327 U.S. 1, 66 n.31 (1946) (Rutledge, J., dissenting) (quoting *Hearings Before the H. Comm. on Military Affairs*, 62d Cong. 53 (statement of Gen. Enoch Crowder)).

<sup>3</sup> John M. Bickers, *Military Commissions are Constitutionally Sound: A Response to Professors Katyal and Tribe*, 34 TEX. TECH L. REV. 899, 902-13 (2003); JENNIFER ELSEA, CONG. RESEARCH SERV., TERRORISM AND THE LAW OF WAR: TRYING TERRORISTS AS WAR CRIMINALS BEFORE MILITARY COMMISSIONS 18-25 (2001).

<sup>4</sup> *Reid v. Covert*, 354 U.S. 1, 19 n.38 (1957).

<sup>5</sup> WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 831 (rev. 2d ed. 1920).

v. Rumsfeld,<sup>6</sup> which struck down the military commissions established under the 2001 Military Order of President George W. Bush,<sup>7</sup> the Court found the commissions' permissive approach to hearsay "striking."<sup>8</sup> While the Bush Military Order was based largely on rules used in previous military commissions and other war crimes tribunals,<sup>9</sup> a majority of the Justices in *Hamdan* found that the Order violated the Uniform Code of Military Justice and the Geneva Conventions.<sup>10</sup>

In light of the non-constitutional grounds for the Supreme Court's ruling, Congress's subsequent passage of the Military Commissions Act (MCA) of 2006<sup>11</sup> effectively overruled the *Hamdan* decision.<sup>12</sup> Later amended in 2009,<sup>13</sup> the current MCA has retained a rule that permits the use of otherwise inadmissible hearsay, based on a detailed set of preliminary considerations by the military judge.<sup>14</sup> Since no other source of applicable law presents any impediment,<sup>15</sup> the only remaining question is whether the MCA's permissive hearsay rule is constitutional.

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<sup>6</sup> 548 U.S. 557 (2006).

<sup>7</sup> Mil. Order of November 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter *Bush Military Order*].

<sup>8</sup> See *Hamdan*, 548 U.S. at 614 (addressing the Bush Military Order's evidentiary rule that would allow the admission of "any evidence that, in the opinion of the presiding officer 'would have probative value to a reasonable person'") (emphasis deleted).

<sup>9</sup> See *infra* notes 61-80 and accompanying text.

<sup>10</sup> *Hamdan*, 548 U.S. at 567.

<sup>11</sup> Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended at 10 U.S.C. §§ 948a-950t (2012)) [hereinafter *MCA*].

<sup>12</sup> It is long settled that, with respect to statutes and treaties, the last unambiguous enactment by Congress is what controls. See *Reid v. Covert*, 354 U.S. 1, 18 (1957) ("[A]n Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null."); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation . . . but, if the two are inconsistent, the one last in date will control the other."); *Edye v. Robertson* (Head Money Cases), 112 U.S. 580, 599 (1884) ("[S]o far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.").

<sup>13</sup> The Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2574.

<sup>14</sup> See 10 U.S.C. § 949a(b)(3)(D), *infra* note 81-82 and accompanying text.

<sup>15</sup> While the MCA's hearsay rule is consistent with international practice, see *infra* notes 74-79 and accompanying text, such customary international law cannot in any event override an unambiguous congressional enactment. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."); *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 302 (D.C. Cir. 2005) ("Never does customary international law prevail over a contrary federal statute."); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 136 (2d Cir. 2005) ("[C]lear congressional action trumps customary international law and previously enacted treaties."); see also

This article argues that the MCA's hearsay rule is indeed constitutional. Part II examines the MCA's hearsay rule in comparison with the traditional hearsay rule developed at common law and the related right of confrontation.<sup>16</sup> Part III analyzes the rule in the context of other military commissions and international war crimes tribunals, which have similarly used flexible evidentiary rules to admit probative hearsay evidence for consideration.<sup>17</sup> Based on these historical precedents, Part IV then discusses the constitutional implications of the rule itself.<sup>18</sup>

The resulting analysis yields several conclusions, all of which support the view that the MCA's hearsay rule accords with existing constitutional precedent. First, the traditional hearsay and confrontation rules are corollaries of the Anglo-American legal system's reliance on lay juries, which serve as a political protection of the governed against their government; hence, the justification for strict adherence to these rules has little application to law-of-war commissions convened to adjudicate war crimes against foreign enemies.<sup>19</sup> Second, as part of the bulwark that provides for the national defense, military commissions have historically emphasized function over form in using flexible evidentiary rules and other trial procedures—an approach echoed by international war crimes tribunals even to this day.<sup>20</sup> Third, the MCA's hearsay rule is fully in line with past precedent and current practice in this regard, and its provisions are aptly suited to the ends for which they are designed: the search for truth.<sup>21</sup> Finally, as a mechanism supported by both Congress and the President in discharging their constitutional powers to defend the nation, military commissions convened under the MCA are entitled to the same constitutional deference as the military commissions that have preceded them, all of which have been based to some extent, like war itself, on practical considerations.<sup>22</sup>

## II. Origins and History of the Hearsay and Confrontation Rules

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Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (observing that, to the extent it is ambiguous, a statute should be construed so as not to conflict with international law).

<sup>16</sup> See *infra* notes 23-54 and accompanying text.

<sup>17</sup> See *infra* notes 55-86 and accompanying text.

<sup>18</sup> See *infra* notes 87-161 and accompanying text.

<sup>19</sup> See *infra* notes 31-42 and accompanying text.

<sup>20</sup> See *infra* notes 55-74 and accompanying text.

<sup>21</sup> See *infra* notes 81-86 and accompanying text.

<sup>22</sup> See *infra* notes 148-61 and accompanying text.

Hearsay, as the familiar definition holds, is an out-of-court statement offered to prove the truth of the matter asserted.<sup>23</sup> Subject to numerous exceptions, exclusions, and other definitional nuances,<sup>24</sup> hearsay is generally not admissible in U.S. civilian trials or courts-martial without an Act of Congress.<sup>25</sup> Having developed over three centuries of common law, however, the traditional hearsay rule is now so riddled with exceptions that even the Supreme Court has likened it to “an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists, and surrealists.”<sup>26</sup> Some exceptions are premised on the unavailability of the declarant;<sup>27</sup> others apply regardless of the declarant’s availability.<sup>28</sup> In addition to the over two dozen specific exceptions, a residual exception serves as a catch-all for hearsay that may properly be admitted, notwithstanding the traditional rule.<sup>29</sup> The presence of all these exceptions is, of course, founded on the fundamental idea that at least some hearsay is generally deemed reliable enough to be admitted into evidence for consideration by the fact-finder.<sup>30</sup>

#### A. Development of the Hearsay Rule

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<sup>23</sup> FED. R. EVID. 801(c).

<sup>24</sup> FED. R. EVID. 801, 803-807.

<sup>25</sup> FED. R. EVID. 802; MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 802 (2012) [hereinafter MCM].

<sup>26</sup> Ohio v. Roberts, 448 U.S. 56, 62 (1980) (quoting Edmund M. Morgan & John M. Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 921 (1937)).

<sup>27</sup> FED. R. EVID. 804.

<sup>28</sup> FED. R. EVID. 803.

<sup>29</sup> The residual exception provides as follows:

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant’s name and address, so that the party has a fair opportunity to meet it.

FED. R. EVID. 807.

<sup>30</sup> See MICHAEL R. FONTHAM, TRIAL TECHNIQUE AND EVIDENCE 194 (3rd ed. 2008) (“The considerations of necessity, reliability, and adversarial fairness led to the creation of the hearsay exceptions.”)

The traditional hearsay rule, derived from centuries of common law, is principally the result of the Anglo-American legal system's reliance on lay juries as a protection of the governed against their government.<sup>31</sup> As Alexis de Tocqueville recognized in his early observations of the United States, the jury is "first and foremost, a political institution and must always be judged from that point of view."<sup>32</sup> The Supreme Court has agreed with Tocqueville's view, shared by others at the time of the founding, that the right to trial by jury, preserved in the Sixth Amendment,<sup>33</sup> is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."<sup>34</sup> Thus, as Tocqueville observed, the institution of the American jury was not only deemed an effective method for teaching citizens how to govern their new republic, but also "the most energetic method of asserting the people's rule."<sup>35</sup>

Because of the power it placed in the hands of lay juries, however, the Anglo-American legal system produced a law of evidence that, as one commentator has described it, is "imbued with a spirit of skepticism."<sup>36</sup> The principal concern in the development of hearsay and other evidentiary rules at common law was that lay jurors were not sophisticated enough to assess the probative worth of certain evidence and might, therefore, overvalue evidence of questionable reliability.<sup>37</sup> Based on the view that out-of-court statements are

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<sup>31</sup> See, e.g., Bickers, *supra* note 3, at 930, n.202 ("The most common rationale advanced for the hearsay prohibition in the common law is tied to the existence of the jury."); John H. Langbein, *Historical Foundations of the Law of Evidence: A View From the Ryder Sources*, 96 COLUM. L. REV. 1168, 1194 (1996) ("From the Middle Ages to our own day, the driving concern animating the Anglo-American law of evidence has been to protect against the shortcomings of trial by jury.").

<sup>32</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 317 (Gerald E. Began, trans., Penguin Classics 2003) (1835).

<sup>33</sup> U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .").

<sup>34</sup> Blakely v. Washington, 542 U.S. 296, 306 (2004) (citing, *inter alia*, Letter XV by the Federal Farmer (Jan. 18, 1788), in 2 THE COMPLETE ANTI-FEDERALIST 315, 320 (H. Storing ed. 1981) (describing the jury as "secur[ing] to the people at large, their just and rightful controul [sic] in the judicial department"); John Adams, Diary Entry (Feb. 12, 1771), in 2 WORKS OF JOHN ADAMS 252, 253 (C. Adams ed. 1850) ("[T]he common people, should have as complete a control . . . in every judgment of a court of judicature" as in the legislature); Thomas Jefferson, Letter to the Abbe Arnoux (July 19, 1789), in 15 PAPERS OF THOMAS JEFFERSON 282, 283 (J. Boyd ed. 1958) ("Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative.")).

<sup>35</sup> TOCQUEVILLE, *supra* note 32, at 322.

<sup>36</sup> RONALD CARLSON ET AL., *EVIDENCE IN THE NINETIES: CASES, MATERIALS, AND PROBLEMS FOR AN AGE OF SCIENCE AND STATUTES* 203 (3d ed. 1991).

<sup>37</sup> Jon R. Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. U. L. REV. 1097, 1097 (1985).

inherently less trustworthy than in-court testimony, the hearsay rule seeks to decrease various potential risks for the fact-finder: that the declarant misperceived the facts in question, that his memory is faulty, that he is being insincere or untruthful, or that the narrative itself is ambiguous.<sup>38</sup> The theory of the hearsay rule is that live witness testimony will help curb these risks by requiring an oath of truthfulness, by allowing the fact finder to observe the witness' demeanor, and by exposing the statements to cross-examination.<sup>39</sup>

Modern critics of the traditional hearsay rule, however, contend that the theory behind the rule does not necessarily match up with reality. One acclaimed evidence scholar has summarized the argument:

[t]he theory is pernicious rubbish. It excludes some hearsay that should be admitted, fails to provide a sound justification for excluding hearsay that should be excluded, and gravely over-complicates the entire area. It has no empirical foundation. The empirical evidence does not reveal over-valuation of hearsay and even suggests the possibility of under-valuation. *Bear in mind that much hearsay has very substantial value; if the jurors are giving it great weight, they are acting rationally.*<sup>40</sup>

Modern critics also point out that blanket restrictions on hearsay evidence have remained largely absent from non-jury-based legal systems. In many civil-law systems, for example, the emphasis is placed on receiving evidence and then evaluating its reliability rather than on prohibiting its admission and consideration altogether.<sup>41</sup> Some commentators have suggested that the practices of civil-law systems actually offer better alternatives to hard-and-fast evidentiary restrictions like the hearsay rule, arguing that “[t]he evolution of

<sup>38</sup> See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 721-22 (4th ed. 2009); Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948).

<sup>39</sup> MUELLER & KIRKPATRICK, *supra* note 38, at 724-25.

<sup>40</sup> Richard D. Friedman, *Minimizing the Jury Over-Valuation Concern*, 2003 MICH. ST. L. REV. 955, 976 (emphasis added).

<sup>41</sup> See, e.g., *Hamdan*, 548 U.S. at 732-33 (Alito, J., dissenting) (“Rules of evidence differ from country to country, and much of the world does not follow aspects of our evidence rules, such as the general prohibition against the admission of hearsay.”); Jeremy A. Blumenthal, *Shedding Some Light on Calls for Hearsay Reform: Civil Law Hearsay Rules in Historical and Modern Perspective*, 13 PACE INT’L L. REV. 93, 99-100 (2001) (“Generally, European courts do not use the complex body of evidentiary rules that the Anglo-American system has developed to prevent hearsay testimoni[ly].”); Mirjan Damaska, *Of Hearsay and Its Analogues*, 76 MINN. L. REV. 425, 456-57 (1992).

modern American jury practices has had an adverse impact on the jury's ability to discover the truth and to arrive at just outcomes.”<sup>42</sup>

### B. The Right of Confrontation

A parallel development related to the hearsay rule deals with the right of confrontation, preserved in the Sixth Amendment.<sup>43</sup> Like the hearsay rule, the confrontation right developed as a corollary to the Anglo-American jury system, which preferred live in-court testimony in adversarial trials.<sup>44</sup> In fact, as the Supreme Court has explained, the development of the confrontation right was a reaction to the very feature of continental European systems just discussed: “the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”<sup>45</sup>

Like the traditional hearsay rule, the right of confrontation was embraced in the United States to “advance the ‘accuracy of the truth-determining process in criminal trials.’”<sup>46</sup> As explained in the Supreme Court’s decision in *Ohio v. Roberts*,<sup>47</sup> the right was justified similarly to the hearsay rule’s rationale of promoting the reliability of evidence.<sup>48</sup> Thus, under *Roberts*, out-of-court statements made by unavailable witnesses could only be admitted if they possessed “adequate ‘indicia of reliability,’” either by falling within a “firmly rooted hearsay exception” or by bearing “particularized guarantees of trustworthiness.”<sup>49</sup>

In *Crawford v. Washington*,<sup>50</sup> however, the Supreme Court held that allowing trial judges to make such reliability determinations under *Roberts* did

<sup>42</sup> Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 451 (1997) (advocating, among other things, the relaxation of hearsay rules).

<sup>43</sup> U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”).

<sup>44</sup> See 3 WILLIAM BLACKSTONE, COMMENTARIES 373-74 (1768).

<sup>45</sup> *Crawford v. Washington*, 541 U.S. 36, 50 (2004).

<sup>46</sup> *Tennessee v. Street*, 471 U.S. 409, 415 (1985) (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970)). See also *Maryland v. Craig*, 497 U.S. 836, 845 (1990) (“The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.”); *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987) (“The right to cross-examination, protected by the Confrontation Clause, thus is essentially a ‘functional’ right designed to promote reliability in the truth-finding functions of a criminal trial.”).

<sup>47</sup> 448 U.S. 56 (1980).

<sup>48</sup> *Id.* at 66.

<sup>49</sup> *Id.*

<sup>50</sup> 541 U.S. 36 (2004).

not comport with the strict requirements of the Confrontation Clause.<sup>51</sup> Drawing from the history of the confrontation right, the Court found that while reliable evidence may ultimately be the theory behind the right, it is not the focus of the trial court's inquiry.<sup>52</sup> Under *Crawford*, so long as the out-of-court statement is "testimonial," confronting the witness is a stand alone, fixed procedural right.<sup>53</sup> Therefore, after *Crawford*, testimonial hearsay is excluded from consideration even if it is obviously reliable where the ability to cross examine the declarant is absent.<sup>54</sup>

### III. Military Commissions and Other War Crimes Tribunals

As these hearsay and confrontation rules evolved in civilian court systems and migrated into court-martial practice, military commissions have relied on rules and procedures, which, while patterned on those of general courts-martial, have tended to be less formalistic and more functional in their approach.<sup>55</sup> For example, while Winthrop espoused typical common-law views on the use of hearsay and other evidentiary rules in courts-martial, his approach to military commissions was more pragmatic.<sup>56</sup> Realizing that military commissions were fundamentally creatures of the war powers, he also contemplated that their rules and procedures could be modified by statute or regulation.<sup>57</sup> As the precedents reveal, the rules and procedures that have been used in military commissions and other war crimes tribunals reflect this same pragmatic approach to the admissibility of probative evidence, particularly hearsay.<sup>58</sup>

#### A. World War II Precedents

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<sup>51</sup> *Id.* at 62.

<sup>52</sup> *Id.* at 42-62.

<sup>53</sup> *Id.* at 61-62.

<sup>54</sup> *Id.* at 62 ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the *Sixth Amendment* prescribes.").

<sup>55</sup> See WINTHROP, *supra* note 5, at 841-42.

<sup>56</sup> Compare *id.* at 324-27 (discussing hearsay and exceptions to hearsay) and *id.* at 342-43 (discussing cross-examination and the use of *ex parte* statements) with *id.* at 842 (stating that military commissions are "in general even less technical than a court-martial") and *id.* at 841 (stating that "[t]hese war-courts are indeed more summary in their action than are the courts held under the Articles of war, and . . . their proceedings . . . will not be rendered illegal by the omission of details required upon trials by courts-martial").

<sup>57</sup> *Id.* at 842 (stating that court-martial rules are commonly used "[i]n the absence of any statute or regulation governing the proceedings of military commissions").

<sup>58</sup> See *infra* notes 59-80 and accompanying text.

While there are earlier examples of military commissions applying hearsay and other evidentiary rules in U.S. history,<sup>59</sup> World War II era military commissions and other war crimes tribunals set the benchmark for their use ever since.<sup>60</sup> For example, in 1942, President Franklin D. Roosevelt convened a military commission to try war crimes charges against eight German saboteurs who had infiltrated the United States in order to mount clandestine attacks on U.S. targets.<sup>61</sup> President Roosevelt issued a broad rule of admissibility that would allow for the consideration of hearsay in this military commission: “[s]uch evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man.”<sup>62</sup>

In its review of the defendants’ convictions in *Ex parte Quirin*,<sup>63</sup> the Supreme Court held that the military commission was lawfully constituted and, therefore, denied the defendants’ motions to file for writ of habeas corpus.<sup>64</sup> In reaching its decision, the Court found that violations of the law of war were not “crimes” or “criminal prosecutions” within the meaning of the Fifth and Sixth Amendments, and therefore did not prevent admitting the defendants’ hearsay statements.<sup>65</sup> As a result of the *Quirin* decision, President Roosevelt adopted the same flexible rules for admissibility in establishing other military commissions during the war.<sup>66</sup>

Subsequently, as World War II closed in Europe and the Allies were resolving what forum would be used to prosecute major war crimes, the decision was made to use an International Military Tribunal at Nuremberg that would not rely on the procedural rules of any particular country’s legal system.<sup>67</sup> The resulting procedural rules, the London Charter of 1945, provided great flexibility in determining what evidence could be received, including hearsay, by stating, “[t]he Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and nontechnical

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<sup>59</sup> See ELSEA, *supra* note 3, at 18-23.

<sup>60</sup> See generally Evan J. Wallach, *The Procedural And Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide An Outline For International Legal Procedure?* 37 COLUM. J. TRANSNAT'L L. 851 (1999).

<sup>61</sup> See *Ex parte Quirin*, 317 U.S. 1, 20-23 (1942).

<sup>62</sup> Military Order of July 2, 1942, 7 Fed. Reg. 5103 (July 3, 1942)[hereinafter *Quirin Order*].

<sup>63</sup> 317 U.S. 1 (1942).

<sup>64</sup> *Id.* at 48.

<sup>65</sup> *Id.* at 40.

<sup>66</sup> See Military Order of January 11, 1945, 10 Fed. Reg. 549 (Jan. 16, 1945).

<sup>67</sup> In the words of the U.S. representative at the discussions, Supreme Court Justice Robert H. Jackson, “[a]ll agreed in principle that no country reasonably could insist that an international trial should be conducted under its own system and that we must borrow from all and devise an amalgamated procedure that would be workable, expeditious and fair.” Robert H. Jackson, *Nuremberg in Retrospect: Legal Answer to International Lawlessness*, 35 A.B.A. J. 813, 815 (1949).

procedure, and shall admit any evidence which it deems to be of probative value.”<sup>68</sup> This rule and other procedural rules contained in the London Charter represented a blend of the Continental European civil-law system and the Anglo-American adversarial system.<sup>69</sup>

The rules and procedures outlined in the London Charter, which resembled the earlier *Quirin* Order, set the course for the other post-World War II war crimes tribunals that followed.<sup>70</sup> The London Charter’s flexible rule of admissibility was later expounded upon in 1946 to specify the types of hearsay that could be considered:

Without limiting the foregoing general rules, the following shall be deemed admissible if they appear to the tribunal to contain information of probative value relating to the charges: affidavits, depositions, interrogations and other statements, diaries, letters, the records, findings, statements and judgments of the military tribunals and the reviewing and confirming authorities of any of the United Nations, and copies of any document or other secondary evidence of the contents of any document, if the original is not readily available or cannot be produced without delay.<sup>71</sup>

The Tokyo Charter, created in 1946 on the order of General Douglas MacArthur, adopted similar language in establishing evidentiary rules for the International Military Tribunal for the Far East.<sup>72</sup> Various U.S. regulations also drew from this language in providing rules for the numerous, post-war military commissions held in Europe and Asia,<sup>73</sup> which heard a total of approximately 900 cases involving over 3,000 defendants.<sup>74</sup>

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<sup>68</sup> Charter of the International Military Tribunal Annexed to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 19, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280, available at <http://avalon.law.yale.edu/imt/imtconst.asp>.

<sup>69</sup> Wallach, *supra* note 60, at 854 (citing 1 VIRGINIA MORRIS & MICHAEL SCHARF, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 9-10 (1995)). See also TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 63-64 (1992).

<sup>70</sup> Wallach, *supra* note 60, at 860.

<sup>71</sup> CHIEF OF COUNSEL FOR WAR CRIMES, PUBLISHED REPORT, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 app. L at art. VII (15 Aug. 1949), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_final-report.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/NT_final-report.pdf).

<sup>72</sup> *In re Yamashita*, 327 U.S. 1, 48 n.9 (1946) (quoting Gen. MacArthur’s order).

<sup>73</sup> See U.N. WAR CRIMES COMM’N, LAW REPORTS OF TRIAL OF WAR CRIMINALS annex III, art. VIII (1948), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/Law-Reports\\_Vol-3.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-3.pdf). Specifically, the reports of the War Crimes Commission provide the following information regarding

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the rules of evidence applicable to U.S. military commissions convened in connection with World War II:

The Mediterranean Regulations (Regulation 10) provide expressly that the technical rules of evidence shall not be applied but any evidence shall be admitted which, in the opinion of the president of the Commission, has any probative value to a reasonable man. Similar provisions are contained in paragraph 3 of the European Directive, in Regulation 16 of the Pacific September Regulations, in Regulation 5(d) of the SCAP Rules and in Regulation 16 of the China Regulations.

In the Mediterranean Regulations it is added that without limiting the scope of this rule the following in particular will apply:

- (a) If any witness is dead or is unable to attend or to give evidence or is, in the opinion of the president of the commission, unable to attend without undue delay, the commission may receive secondary evidence of statements made by or attributed to such witness.
- (b) Any document purporting to have been signed or issued officially by any member of any allied or enemy force or by any official or agency of any allied, neutral or enemy government shall be admissible as evidence without proof of the issue or signature thereof.
- (c) Any report by any person when it appears to the president of the commission that the person in making the report was acting within the scope of his duty may be admitted in evidence.
- (d) Any deposition or record of any military tribunal may be admitted in evidence.
- (e) Any diary, letter or other document may be received in evidence as to the facts therein stated.
- (f) If any original document cannot be produced, or, in the opinion of the president of the commission, cannot be produced without undue delay, a copy or translated copy of such document or other secondary evidence of its contents may be received in evidence. A translation of any document will be presumed to be a correct translation until the contrary is shown.
- (g) Photographs, printed and mimeographed matter, and true copies of papers are admissible without proof.
- (h) Confessions are admissible without proof of circumstances or that they were voluntarily made. The circumstances surrounding the taking of a confession may be shown by the accused and such showing may be considered in respect of the weight to be accorded it, but not in respect of its admissibility.

Similar but not identical provisions are contained in the other instruments.

*Id.* In the text, "Pacific September Regulations" refers to the Regulations issued by General MacArthur on September 24, 1945, which were used in the trial of General Yamashita, and "China Regulations" refers to those issued for the China Theatre on January 21, 1946. *Id.* at 105. .

<sup>74</sup> Wallach, *supra* note 60, at 868 n.74 (citing Maximilian Koessler, *American War Crimes Trials in Europe*, 39 GEO. L.J. 18, 25 (1950)).

## B. Modern War Crimes Tribunals

International war crimes tribunals since World War II have generally allowed for the introduction and use of hearsay in their rules and practices.<sup>75</sup> For example, the International Criminal Tribunal for the Former Yugoslavia (ICTY) adopted the following rules as its standard of admissibility:

- (A) A Chamber shall apply the rules of evidence set forth in this Section, and shall not be bound by national rules of evidence.
- (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.
- (C) A Chamber may admit any relevant evidence which it deems to have probative value.
- (D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.
- (E) A Chamber may request verification of the authenticity of evidence obtained out of court.
- (F) A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.<sup>76</sup>

Observers of ICTY proceedings have commented that in practice, “the trial chambers have shown little tendency to exclude evidence, including hearsay evidence,”<sup>77</sup> and have admitted and considered hearsay evidence on such central topics as identification of the defendant.<sup>78</sup> The International Criminal Tribunal for Rwanda operates under nearly identical evidentiary rules.<sup>79</sup> The

<sup>75</sup> ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 384 (2007).

<sup>76</sup> Int'l Tribunal for the Prosecution of Pers. Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Rules of Procedure and Evidence, R. 89, U.N. Doc. IT/32/Rev. 48 (Nov 19, 2012).

<sup>77</sup> Sean D. Murphy, *Developments in International Criminal Law: Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L L. 57, 80 (1999) (“Thus, the basic rule of evidence applied by each trial chamber is to ‘admit any relevant evidence which it deems to have probative value’ (ICTY Rule 89(c)), unless there is a specific reason to question its reliability (ICTY Rule 95).”).

<sup>78</sup> Marsha V. Mills, *War Crimes in the 21st Century*, 3 HOFSTRA L. & POL'Y SYMP. 47, 56 n. 46 (1999) (citing The Prosecutor v. Tadic, No. IT-94-1, Decision on Defense Motion on Hearsay, ¶ 5 (Int'l Crim. Trib. For the Former Yugoslavia Aug. 5, 1996)).

<sup>79</sup> See Int'l Crim. Trib. for the Prosecution of Pers. Responsible for Genocide and Other Serious Violations of Int'l Humanitarian Law Committed in the Terr. of Rwanda, Rules of Procedure and Evidence, R. 89 and 95, U.N. Doc. ITR/3/Rev.18 (Feb. 9 2010).

International Criminal Court in Rome also allows for the consideration of hearsay evidence along similar lines.<sup>80</sup>

### C. The Military Commissions Act

The MCA's hearsay rule comports with the flexible rules used in the previously mentioned war crimes tribunals. In fact, under the current MCA, the rule is in many ways more restrictive than any of these precedents. While the 2006 MCA's rule used broad language, similar to the *Quirin* Order, that “[e]vidence shall be admissible if the military judge determines that the evidence would have probative value to a reasonable person,”<sup>81</sup> the rule was amended in 2009 to contain a much more nuanced approach:

Hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission only if—

- (i) the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the proponent's intention to offer the evidence, and the particulars of the evidence (including information on the circumstances under which the evidence was obtained); and
- (ii) the military judge, after taking into account all of the circumstances surrounding the taking of the statement, including the degree to which the statement is corroborated, the indicia of reliability within the statement itself, and whether the will of the declarant was overborne, determines that—

(I) the statement is offered as evidence of a material fact;

(II) the statement is probative on the point for which it is offered;

(III) direct testimony from the witness is not available as a practical matter, taking into consideration the physical location of the witness, the unique circumstances of

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<sup>80</sup> See Rome Statute of the International Criminal Court, art. 69, ¶ 4, U.N. Doc. A/CONF.183/9 (July 17, 1998).

<sup>81</sup> 10 U.S.C. § 949a(b)(2)(A) (2006).

military and intelligence operations during hostilities, and the adverse impacts on military or intelligence operations that would likely result from the production of the witness; and

(IV) the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.<sup>82</sup>

The substance and complexity of the current MCA is similar to the residual hearsay exception;<sup>83</sup> furthermore, it also places the burden on the proponent of the hearsay to demonstrate that the hearsay is reliable, will serve the interests of justice, and direct testimony either is not available or will adversely impact operations.

Notably, members of military commission panels under the MCA are not lay persons randomly drawn from society at large, but rather professional military officers “who, in the opinion of the convening authority, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.”<sup>84</sup> As some commentators have pointed out, panels of fact finders that are so composed, even if not legally trained *per se*, are more likely to reach reasoned decisions based on the evidence.<sup>85</sup> Indeed, other commentators have urged that in light of their military and combat experience, military service members should be mandatory for inclusion on humanitarian law tribunals.<sup>86</sup>

#### IV. Constitutionality of the MCA’s Hearsay Rule

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<sup>82</sup> 10 U.S.C. § 949a(b)(3)(D) (2012). In addition, the MCA elsewhere prohibits the admission of any statement (irrespective of declarant) that was “obtained by the use of torture or by cruel, inhuman, or degrading treatment.” 10 U.S.C. § 948r(a) (2012).

<sup>83</sup> See *supra* note 29.

<sup>84</sup> 10 U.S.C. § 948i(b) (2012).

<sup>85</sup> Michael T. McCaul & Ronald J. Sievert, *Congress’s Consistent Intent to Utilize Military Commissions in the War Against Al-Qaeda and Its Adoption of Commission Rules That Fully Comply with Due Process*, 42 ST. MARY’S L.J. 595, 644 (2011) (arguing that panels comprised of military officers have a reduced likelihood of containing “rogue, irrational jurors too often found in civilian cases”).

<sup>86</sup> See Richard V. Meyer, *Following Historical Precedent: An Argument for the Continued Use of Military Professionals as Triers of Fact in Some Humanitarian Law Tribunals*, 7 J. INT’L CRIM. JUST. 43 (2009).

The foregoing description of both the MCA's hearsay rule and its historical precedents is a necessary foundation for understanding the current rule's constitutionality, which breaks down into four central issues. First, as creatures of the war powers, military commissions in and of themselves do not implicate the Bill of Rights like civilian criminal trials or even courts-martial. Second, the alien enemy belligerents who are captured, held, and tried outside the United States, and to whom the MCA applies, do not possess the same constitutional rights as persons with more substantial and voluntary connections to the United States. Third, the MCA's hearsay rule does not pose the sort of fundamental constitutional concerns that apply outside the United States, particularly when the rule is consistent with historical precedent and rooted in appropriate, practical considerations to ensure reliable and fair proceedings. Finally, the MCA's hearsay rule is precisely the type of decision the Constitution delegates to the political branches, which, during periods of ongoing hostilities, is entitled to greater deference under the separation of powers doctrine.

#### A. Military Commissions Under the Constitution

War crimes military commissions are not the sort of judicial proceedings that invoke the constitutional protections provided for in the Bill of Rights. As the Supreme Court held in *Ex Parte Quirin*,<sup>87</sup> violations of law of war are not ordinary "crimes" and military commissions are not "criminal prosecutions" within the meaning of the Fifth and Sixth Amendments.<sup>88</sup> Because the court in *Quirin* determined that "the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission . . ."<sup>89</sup> a defendant may be tried in a military commission irrespective of citizenship.<sup>90</sup>

The *Quirin* decision is the single most important precedent in this area. It not only underscores the inherent constitutionality of military commissions, but also confirms that alleged war criminals can be charged in military commissions, even when prosecution in civilian court is an available alternative.<sup>91</sup> Moreover, after discussing the inapplicability of the Fifth and Sixth Amendments to military commissions, the Court ultimately concluded that

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<sup>87</sup> See *supra* note 61 and accompanying text.

<sup>88</sup> *Ex parte Quirin*, 317 U.S. 1, 40 (1942). (determining that military commissions are also not within the meaning of Article III, § 2 of the Constitution).

<sup>89</sup> *Id.* at 45.

<sup>90</sup> *Id.* (distinguishing *Ex parte Milligan*, 7 U.S. 2 (1866)).

<sup>91</sup> *Id.*

“[the President’s] Order convening the Commission was a lawful order and that the Commission was lawfully constituted. . . .”<sup>92</sup> As discussed earlier, the *Quirin* Order broadly permitted that “[s]uch evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man.”<sup>93</sup> Hence, in finding the *Quirin* Order lawful, the Court tacitly approved the use of flexible evidentiary rules that admit testimonial hearsay in military commissions.<sup>94</sup>

The Supreme Court’s holding in *Quirin* distinguishes military commissions from civilian courts, which provide constitutional protections to foreign belligerents tried in the United States. The Second Circuit, for example, has held that the Fifth Amendment self-incrimination privilege protects nonresident aliens tried in U.S. federal court, even if the interrogation at issue occurred overseas.<sup>95</sup> *Quirin*, on the other hand, stands for the proposition that such Fifth and Sixth Amendment protections do not attach, even in military commissions convened inside the United States, much less those held overseas in places like Guantanamo Bay, Cuba. Hence, the evidentiary rules for military commissions convened under the MCA, including its hearsay rule, are not subject to any restrictions imposed by the Fifth Amendment Due Process Clause or the Sixth Amendment Confrontation Clause.

#### B. Alienage as a Function of Constitutional Protection

Secondly, protections under the Bill of Rights have specifically not been extended to *alien enemy belligerents*—those who are captured, held, and tried by military commissions outside the United States—to whom jurisdiction is limited under the MCA.<sup>96</sup> In *Johnson v. Eisentrager*,<sup>97</sup> the Supreme Court reviewed a U.S. military commission convened in China that tried and convicted twenty-one German nationals for conducting unlawful hostilities after the

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<sup>92</sup> *Id.* at 48.

<sup>93</sup> See Military Order of January 11, 1945, ¶2(a), 10 Fed. Reg. 549 (Jan. 16, 1945).

<sup>94</sup> *Quirin* has been followed in other cases, most notably in *In re Yamashita*, 327 U.S. 1, 7-9 (1946), which reviewed a military commission convened to prosecute a Japanese general for war crimes committed principally against the civilian population of the Philippines while under his command during World War II. In *Yamashita*, which also involved the use of a permissive hearsay rule, the Supreme Court held that the military commission was lawfully constituted and “did not violate any military, statutory, or constitutional command.” *Id.* at 25.

<sup>95</sup> *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 177, 201 (2d Cir. 2008).

<sup>96</sup> See 10 U.S.C. § 948c (2012) (“Any alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter [of the MCA]”). The MCA defines “alien” as “an individual who is not a citizen of the United States.” 10 U.S.C. § 948a(1) (2012).

<sup>97</sup> 339 U.S. 763 (1950).

German surrender in World War II.<sup>98</sup> These German nationals filed habeas actions alleging violations of various constitutional provisions, including the Fifth Amendment, upon their transfer to a U.S. military base in Germany.<sup>99</sup> The Supreme Court denied their claims, finding “no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located, and whatever their offenses.”<sup>100</sup>

The Court in *Eisentrager* discussed that constitutional rights, far from being universally applicable, instead depend to a large degree on U.S. citizenship or some other degree of connection to, and presence in, the United States:

The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization . . . . [B]ut, in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act.<sup>101</sup>

In the absence of any connection to the United States by the German petitioners in *Eisentrager*, other than their capture, detention, and trial as enemy belligerents, the Court denied them any protection under the Bill of Rights, noting that to invest nonresident alien enemies with such rights would put them in “a more protected position than our own soldiers.”<sup>102</sup>

The Court went on to find that evidence of such connections to the United States is all the more compelling during periods of hostilities.<sup>103</sup> At such times, the law of the United States “does not abolish inherent distinctions

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<sup>98</sup> See *id.* at 765-66.

<sup>99</sup> See *id.* at 766-67.

<sup>100</sup> *Id.* at 783.

<sup>101</sup> *Id.* at 770-71.

<sup>102</sup> *Id.* at 783. The Court noted that “American citizens conscripted into the military service are thereby stripped of their Fifth Amendment rights and as members of the military establishment are subject to its discipline, including military trials for offenses against aliens or Americans.” *Id.*

<sup>103</sup> See *id.* at 771 (“It is war that exposes the relative vulnerability of the alien’s status.”).

recognized throughout the civilized world between citizens and aliens, nor between aliens of friendly and of enemy allegiance . . . .”<sup>104</sup> Nonresident aliens have historically had less standing under U.S. law during periods of armed conflict, and understandably so, since foreign enemies’ use of rights secured under the law could be used to undermine the security of the very Nation the law is designed to serve.<sup>105</sup> Finding that military authorities had long possessed jurisdiction to prosecute war crimes in connection with hostilities,<sup>106</sup> the Court in *Eisentrager* explicitly rejected the “doctrine that the term ‘any person’ in the Fifth Amendment spreads its protection over alien enemies anywhere in the world engaged in hostilities against us.”<sup>107</sup>

Since *Eisentrager*, other Supreme Court decisions have reaffirmed the proposition that nonresident aliens without sufficient connection to and presence in the United States—let alone those who are enemy belligerents captured, held, and tried by military commissions—are not protected by the Bill of Rights. In *United States v. Verdugo-Urquidez*,<sup>108</sup> the Court confronted a Fourth Amendment violation, similar to the issue in *Eisentrager*, when it reviewed a warrantless search conducted by U.S. authorities of a suspected narcotics trafficker’s residences in Mexico.<sup>109</sup> At the time of the search, the defendant, a Mexican national, was arrested in Mexico, brought to the U.S. border, delivered into U.S. custody, and then detained inside the United States.<sup>110</sup>

The Court in *Verdugo-Urquidez* held that the Fourth Amendment did not extend its protections to a nonresident alien whose property was located outside the United States and whose only connection to the United States was his detention for trial.<sup>111</sup> Examining the history of the Fourth Amendment, the Court found that “the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.”<sup>112</sup> While aliens *per se* enjoy certain constitutional rights,<sup>113</sup> the Court in *Verdugo-*

<sup>104</sup> *Id.* at 769.

<sup>105</sup> *See id.* at 776.

<sup>106</sup> *See id.* at 786.

<sup>107</sup> *Id.* at 782.

<sup>108</sup> 494 U.S. 259 (1990).

<sup>109</sup> *See id.* at 262.

<sup>110</sup> *See id.*

<sup>111</sup> *See id.* at 261, 271.

<sup>112</sup> *Id.* at 266.

<sup>113</sup> *See generally Plyler v. Doe*, 457 U.S. 202, 211-12 (1982) (illegal aliens cannot be arbitrarily excluded from public education under the Equal Protection Clause); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (resident alien is a “person” within the meaning of the Fifth Amendment);

*Urquidez* affirmed *Eisentrager*, holding that such constitutional protections only attach when an alien has come within the sovereign territory of, and developed substantial voluntary connections with, the United States.<sup>114</sup> Therefore, finding no substantial, voluntary connections to the United States by the defendant in *Verdugo-Urquidez*, the Court held that protections afforded under the Fourth Amendment did not universally apply to non-resident aliens.<sup>115</sup>

In light of their own history and development, the traditional hearsay rule and confrontation right do not warrant any different treatment than the Fourth and Fifth Amendment rights that were held inapplicable in *Eisentrager* and *Verdugo-Urquidez*. As discussed earlier, both the hearsay and confrontation rules evolved as corollaries to the Anglo-American system of adversarial jury trials, which developed as a political protection for the governed against their own government.<sup>116</sup> There is no indication that the founders intended such a political protection to extend to foreign enemy belligerents captured and tried overseas pursuant to the war powers. To the contrary, the history of military commissions reveals exactly the opposite conclusion; such constitutional rights were never intended to apply to enemy combatants, particularly those tried in the middle of ongoing hostilities.<sup>117</sup>

Counterintuitively, the Supreme Court reaffirmed this view in *Boumediene v. Bush*,<sup>118</sup> by holding that the Suspension Clause<sup>119</sup> applies to individuals detained at Guantanamo Bay and that the status review process for detainees held there was not an adequate and effective substitute for habeas corpus.<sup>120</sup> In discussing the deficiencies of the status review process, the Court pointed out that “unlike in *Eisentrager*, there has been no trial by military

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Bridges v. Wixon, 326 U.S. 135, 148 (1945) (resident aliens have First Amendment rights); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (resident aliens are entitled to protection under the Fifth and Sixth Amendments); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (Fourteenth Amendment protects resident aliens).

<sup>114</sup> See *Verdugo-Urquidez*, 494 U.S. at 272. See also *Plyler*, 457 U.S. at 212 (finding the provisions of the Fourteenth Amendment “are universal in their application, to all persons within the territorial jurisdiction”) (quoting *Yick Wo*, 118 U.S. at 369); Kwong Hai Chew, 344 U.S. at 596 n.5 (“The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.”)(emphasis added)(quoting *Bridges*, 326 U.S. at 161 (Murphy, J., concurring)).

<sup>115</sup> See *Verdugo-Urquidez*, 494 U.S. at 274-75.

<sup>116</sup> See *supra* notes 31-45 and accompanying text.

<sup>117</sup> See *supra* notes 55-74 and accompanying text.

<sup>118</sup> 553 U.S. 723 (2008).

<sup>119</sup> U.S. CONST. art. I, § 9, cl. 2 (“The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”).

<sup>120</sup> See *Boumediene*, 553 U.S. at 732, 771.

commission for violations of war.”<sup>121</sup> The Court then highlighted the legal procedures that it found lacking at Guantanamo Bay by comparing them with the “rigorous adversarial process” afforded by the military commission in *Eisentrager*.<sup>122</sup> As we have seen, the military commission in *Eisentrager* employed flexible evidentiary rules—originally used in *Quirin*, subsequently adopted and expounded upon for use at Nuremberg, and eventually used in U.S. military commissions throughout Europe and Asia—that were far more permissive in admitting hearsay than the MCA’s hearsay rule.<sup>123</sup> Hence, by using *Eisentrager* as an example of the necessary procedural safeguards at a commission, the Court in *Boumediene* affirmed that rules allowing for the use of hearsay in military commissions are not in and of themselves constitutionally unsound.<sup>124</sup>

### C. The Extraterritorial Reach of the Bill of Rights

The Court’s analysis in *Boumediene* additionally supports the idea that flexible hearsay rules do not pose the sort of fundamental constitutional concerns that generally extend outside the United States. In concluding that the Suspension Clause applies to individuals detained at Guantanamo Bay, the Court in *Boumediene* drew extensively from a series of cases now known as the “Insular Cases,”<sup>125</sup> which addressed the extent to which constitutional protections extend to unincorporated U.S. territories.<sup>126</sup> As the Court stated in *Verdugo-Urquidez*, the Insular Cases collectively held that “not every constitutional provision applies to governmental activity even where the United States has sovereign power.”<sup>127</sup> Rather, “[o]nly ‘fundamental’ constitutional rights are guaranteed to inhabitants of those territories.”<sup>128</sup> In fact, the Insular

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<sup>121</sup> *Id.* at 767.

<sup>122</sup> *Id.*

<sup>123</sup> See *supra* note 72 and accompanying text.

<sup>124</sup> See *Boumediene*, 553 U.S. at 786 (noting that “on their own terms, the proceedings in *Yamashita* and *Quirin*, like those in *Eisentrager*, had an adversarial structure that is lacking here”) (citations omitted).

<sup>125</sup> See generally *De Lima v. Bidwell*, 182 U.S. 1 (1901), *Dooley v. United States*, 182 U.S. 222 (1901), *Armstrong v. United States*, 182 U.S. 243 (1901), *Downes v. Bidwell*, 182 U.S. 244 (1901), *Hawaii v. Mankichi*, 190 U.S. 197 (1903), *Dorr v. United States*, 195 U.S. 138 (1904).

<sup>126</sup> *Boumediene*, 553 U.S. at 754-60.

<sup>127</sup> *Verdugo-Urquidez*, 494 U.S. at 268 (citing *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (Sixth Amendment right to jury trial inapplicable in Puerto Rico); *Ocampo v. United States*, 234 U.S. 91 (1914) (Fifth Amendment grand jury provision inapplicable in Philippines); *Dorr v. United States*, 195 U.S. 138 (1904) (jury trial provision inapplicable in Philippines); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (provisions on indictment by grand jury and jury trial inapplicable in Hawaii); *Downes v. Bidwell*, 182 U.S. 244 (1901) (Revenue Clauses of Constitution inapplicable to Puerto Rico)).

<sup>128</sup> *Verdugo-Urquidez*, 494 U.S. at 268 (citing *Dorr*, 195 U.S. at 148; *Balzac*, 258 U.S. at 312-13).

Cases repeatedly held that Fifth and Sixth Amendment rights affording the prototypical Anglo-American legal system's rights to grand jury and jury trial are *not* fundamental.<sup>129</sup> Therefore, the traditional hearsay rule and confrontation right, which developed as corollaries to the Anglo-American adversarial jury system,<sup>130</sup> are not fundamental either.

In its discussion of the Insular Cases, the Court in *Boumediene* reinforced this point by addressing the very issue that we have discussed with respect to evidentiary rules in military commissions and other war crimes tribunals: the differences between the European civil-law system and the Anglo-American jury system.<sup>131</sup> A principal issue in the Insular Cases was that many of the unincorporated territories where defendants' sought extraterritorial application of protections under the Bill of Rights, had been former Spanish colonies and therefore operated under civil-law systems.<sup>132</sup> Viewing the displacement of operating legal systems as "not only disruptive but also unnecessary," and "noting the inherent practical difficulties of enforcing all constitutional provisions always and everywhere," the Court adopted a flexible approach in the Insular Cases.<sup>133</sup> Upending the "wholly dissimilar traditions and institutions" of functioning legal systems—which were, of course, vastly more dissimilar to Anglo-American practice than the traditions and institutions of military commissions—was not viewed as one of the requirements that the Constitution imposed.<sup>134</sup> Moreover, in holding that the Constitution did not require the dismantling of those civil-law systems, the Court tacitly approved the use of hearsay evidence that is an inherent aspect of such systems,<sup>135</sup> which reinforces the conclusion that the traditional hearsay rule and confrontation right are not fundamental constitutional rights, even in U.S. sovereign territory.

Drawing from its analysis in both the Insular Cases and *Eisentrager*, the Court explained in *Boumediene* that ultimately, questions about what constitutional protections are fundamental enough to apply outside the United States "turn on objective facts and practical concerns, not formalism."<sup>136</sup>

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<sup>129</sup> See *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (Sixth Amendment right to jury trial); *Ocampo v. United States*, 234 U.S. 91 (1914) (Fifth Amendment grand jury); *Dorr v. United States*, 195 U.S. 138 (1904) (jury trial); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (indictment by grand jury and jury trial).

<sup>130</sup> See *supra* notes 31-45 and accompanying text.

<sup>131</sup> See *supra* notes 41-45 and 69 and accompanying text.

<sup>132</sup> See *Boumediene v. Bush*, 553 U.S. 723, 757 (2008).

<sup>133</sup> See *id.* at 757-59 (internal quotation marks and citation omitted).

<sup>134</sup> See *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring).

<sup>135</sup> See *supra* notes 41 and 45 and accompanying text.

<sup>136</sup> *Boumediene*, 553 U.S. at 764.

Practical concerns, of course, are precisely why flexible hearsay rules exist. As the Court stated in *Hamdi v. Rumsfeld*<sup>137</sup> in regards to detention status reviews,

the exigencies of the circumstances may demand that . . . enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. *Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding.*<sup>138</sup>

No doubt it was for that reason that Congress saw fit to write such practical concerns into the face of the MCA's hearsay rule, which as a predicate to the use of any hearsay requires the military judge to find, in addition to indicia of the statement's reliability, that

direct testimony from the witness is not available *as a practical matter*, taking into consideration the physical location of the witness, the unique circumstances of military and intelligence operations during hostilities, and the adverse impacts on military or intelligence operations that would likely result from the production of the witness.<sup>139</sup>

Similar to the residual hearsay exception,<sup>140</sup> the MCA's hearsay rule is designed to provide a flexible and practical approach to admitting probative hearsay evidence, once its reliability is determined by the military judge.

The Court's emphasis on practical concerns in *Boumediene* also weighs against applying the Sixth Amendment Confrontation Clause to individuals detained at Guantanamo Bay, since the confrontation right, as construed under *Crawford*, rests on the pinnacle of the formalism that *Boumediene* eschews. In *Crawford*, the Court held that the Confrontation Clause is at root a procedural, not a substantive, right which prohibits the use of even obviously reliable hearsay.<sup>141</sup> The rigidity of the Confrontation Clause under *Crawford* is directly linked to its history, which, like that of the traditional hearsay rule, originated as part of the Anglo-American adversarial jury system's protection of the governed

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<sup>137</sup> 542 U.S. 507 (2004).

<sup>138</sup> *Id.* at 533-34 (emphasis added).

<sup>139</sup> 10 U.S.C. § 949a(b)(3)(D)(ii)(III) (2012) (emphasis added).

<sup>140</sup> See *supra* note 29.

<sup>141</sup> *Crawford v. Washington*, 541 U.S. 36, 61-62 (2004).

against their government.<sup>142</sup> Unlike the history of the writ of habeas corpus, which the Court discussed at length in *Boumediene*,<sup>143</sup> there is no historical foundation suggesting the founders intended either the hearsay rule or the Confrontation Clause to apply to captured alien enemy belligerents tried overseas during periods of armed conflict.<sup>144</sup> To the contrary, the history of military commissions supports the conclusion that their rules and procedures have always been based on practical considerations and have, therefore, tended to be more flexible than the rules applicable to civilian criminal trials and courts-martial.<sup>145</sup>

The legacy of *Boumediene* is thus a reaffirmation of the principle that, consistent with the Constitution in general and the Bill of Rights in particular, traditional procedural rights can bow to appropriate practical considerations. Even if some aspect of the Constitution, such as the Suspension Clause, flows to the protection of alien enemy belligerents held at Guantanamo Bay, neither the traditional hearsay rule nor the Confrontation Clause comprise a fundamental protection that is constitutionally required to be given to detainees tried by military commission.<sup>146</sup> In light of the myriad procedural protections that the MCA affords to accused alien enemy belligerents,<sup>147</sup> neither objective facts nor practical concerns under *Boumediene* justify breaking new constitutional ground by extending the Bill of Rights to military commissions conducted at Guantanamo Bay.

#### D. The Separation of Powers

Finally, inasmuch as the Supreme Court in *Boumediene* found that the constitutional separation of powers weighed in favor of holding the Suspension Clause applicable to individuals detained at Guantanamo Bay,<sup>148</sup> the same

<sup>142</sup> See *supra* notes 43-45 and accompanying text.

<sup>143</sup> See *Boumediene v. Bush*, 553 U.S. 723, 739-52 (2008).

<sup>144</sup> See *supra* notes 31-45 and accompanying text.

<sup>145</sup> See *supra* notes 55-73 and accompanying text.

<sup>146</sup> In addition, while the confrontation right has been applied in both state criminal trials, see *Pointer v. Texas*, 380 U.S. 400, 403 (1965), and courts-martial, see *United States v. Strangstalien*, 7 M.J. 225, 241 (C.M.A. 1979), the Supreme Court has never held that such rights are an inherent aspect of fundamental due process. In *Pointer v. Texas*, for example, the Court issued a limited holding, that the Sixth Amendment Confrontation Clause applied to the States via the Fourteenth Amendment. See *id.* at 403. The majority did not join in Justice Harlan's concurring opinion that "a right of confrontation is 'implicit in the concept of ordered liberty,' reflected in the Due Process Clause of the Fourteenth Amendment independently of the Sixth." *Id.* at 408 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

<sup>147</sup> See generally MCA, *supra* note 11.

<sup>148</sup> See *Boumediene*, 553 U.S. at 764-66.

rationale heavily weighs against applying the Bill of Rights there. In this regard, the constitutionality of the MCA's hearsay rule is supported most by the *Hamdan* decision itself, in which the five-Justice majority noted from the outset that the fundamental issue surrounding military commissions concerns separation of powers.<sup>149</sup> Four of the Justices in *Hamdan* also subscribed to the view that, while statutory grounds existed to overturn the military commissions established under the Bush Military Order, no such prohibition barred a similar military commission system from being established by congressional action:

The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a "blank check." Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary . . . . The Constitution places its faith in those democratic means. Our Court today simply does the same.<sup>150</sup>

The President did exactly what the Court's ruling mandated: he went to Congress and worked with its leadership to secure passage of the MCA, which established military commissions that would, among other things, have greater flexibility to admit and consider probative evidence, including hearsay.<sup>151</sup> Since then, the MCA's hearsay rule was among the commission rules that were specifically considered and subsequently amended by a different Congress and President, to ensure that hearsay evidence was shown to be reliable prior to its admission and consideration.<sup>152</sup>

There is no question then, that the MCA's hearsay rule is the result of the concerted action of both political branches of government, which entitles it to great deference under the separation of powers doctrine. As Justice Jackson stated in his seminal concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,

[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for

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<sup>149</sup> See *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006) (stating that "trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure . . .") (citing *Ex parte Quirin*, 317 U.S. 1, 19 (1942)); see also *id.* at 638 (Breyer, J., concurring) ("Trial by military commission raises separation of powers concerns of the highest order.").

<sup>150</sup> *Id.* at 636 (Breyer, J., concurring).

<sup>151</sup> See *supra* note 12 and accompanying text.

<sup>152</sup> See *supra* note 14 and accompanying text.

it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power.<sup>153</sup>

The Federal Government acting as an undivided whole certainly does not lack the power to once again order a system of military commissions into the service of the Nation during a period of armed conflict, and to equip those commissions with rules and procedures that, based on proven historical precedents, are deemed most appropriate to meet the circumstances of the conflict at hand.

Indeed, the political branches are precisely those to whom the Constitution delegates power and responsibility over such matters. As the Supreme Court has held, due process, in general, “is flexible and calls for such procedural protections as the particular situation demands.”<sup>154</sup> Even so, “particular deference” must be given to the determination of Congress as to what process is due in the military context.<sup>155</sup> And beyond/outside the military context in general, the Court has specifically held that with respect to periods of hostilities, “our Constitution recognizes that core strategic matters of war-making belong in the hands of those who are best positioned and most politically accountable for making them.”<sup>156</sup>

Creating rules and procedures for the establishment and functioning of military commissions lies at the very heart of war-making power.<sup>157</sup> As the Supreme Court stated in *Quirin*:

An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary

<sup>153</sup> 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring).

<sup>154</sup> *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

<sup>155</sup> See *Weiss v. United States*, 510 U.S. 163, 177 (1994) (“Judicial deference thus is at its apogee when reviewing congressional decision making in this area.”) (internal quotation marks and citations omitted).

<sup>156</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004) (citing *Dep’t of the Navy v. Egan*, 484 U.S. 518, 530 (1988) (noting the reluctance of the courts “to intrude upon the authority of the Executive in military and national security affairs”); *Youngstown* 343 U.S. at 587 (acknowledging “broad powers in military commanders engaged in day-to-day fighting in a theater of war”)).

<sup>157</sup> See WINTHROP, *supra* note 5, at 831.

measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.<sup>158</sup>

The congressional and presidential use of such core powers over such core matters is “so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”<sup>159</sup> Thus, even if some form of constitutional due process does reach the alien enemy combatants held at Guantanamo Bay, the MCA’s hearsay rule is entitled to the greatest deference offered under the constitutional separation of powers.

The MCA’s hearsay rule survives such scrutiny and then some. Given the over two dozen exceptions to the traditional hearsay rule, including a broad (albeit seldom used) residual exception, it is clear that, even in civilian trials, there is general agreement that hearsay can indeed be both reliable and probative. As we have explored, modern criticism of the traditional hearsay rule suggests that the rule does not promote reliability of evidence any more than civil-law systems that have no such rule.<sup>160</sup> It is therefore not unreasonable that hundreds of previous military commissions and other war crimes tribunals have used evidentiary rules that are even more permissive toward admitting hearsay than the MCA’s rule.<sup>161</sup> In light of that history, the MCA’s hearsay rule strikes a fair balance between allowing probative hearsay evidence to be considered, yet restricting it to what the military judge has specifically determined to be reliable. Thus, while the standard mandated by the separation of powers is one of extreme deference to Congress and the President, the MCA’s hearsay rule comports with fundamental fairness by any measure.

## V. Conclusion

While capturing and trying enemy belligerents by military commission is certainly not the only available means to defend the nation in the current conflict,<sup>162</sup> the military commissions convened under the MCA are in line with

<sup>158</sup> *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942). *See also In re Yamashita*, 327 U.S. 1, 11 (1946) (“The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war.”).

<sup>159</sup> *Mathews v. Diaz*, 426 U.S. 67, 81 n.17 (1976) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952)).

<sup>160</sup> *See supra* notes 40-42 and accompanying text.

<sup>161</sup> *See supra* notes 55-80 and accompanying text.

<sup>162</sup> *See, e.g.*, Carol E. Lee & Adam Entous, *Obama Defends Drone Use*, WALL ST. J., Jan. 31, 2012, at A2 (reporting that “U.S. officials estimate the drone campaign has killed more than 1,500 suspected militants on Pakistani soil alone since Mr. Obama took office in 2009,” which the

previous military commissions and other war crimes tribunals in providing for a “dispassionate inquiry on legal evidence.”<sup>163</sup> That such commissions may consider hearsay evidence, so long as it is previously determined to be reliable by the presiding military judge, is neither novel nor constitutionally unsound. Indeed, such an approach is eminently reasonable, particularly in light of the probing criticisms of the traditional hearsay rule itself, which is perhaps why the history of military commissions and other war-crimes tribunals is steeped in non-formalistic, pragmatic approaches to the administration of justice during times of war.<sup>164</sup> Justice Cardozo once said, “[t]he power of the precedent is the power of the beaten path.”<sup>165</sup> Although the constitutionality of the MCA’s hearsay rule may ultimately depend on how it is applied in a given case,<sup>166</sup> the path of permitting hearsay evidence to be considered in military commissions is extraordinarily well-trodden.

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President credited with “helping put the U.S. ‘on the offense’ against al Qaeda”); Julian E. Barnes & Evan Perez, *Holder Defends Antiterror Policies: Attorney General Makes Legal Case for Targeting American Citizens Who Pose Threats From Abroad*, WALL ST. J., Mar. 6, 2012, at A4 (reporting the Attorney General’s view that “[i]t is constitutional for the U.S. government to kill a U.S. citizen posing an imminent terrorist threat to the country if capturing that person isn’t feasible and the strike is conducted in accordance with the laws of war”); Adam Entous et al., *U.S. Relaxes Drone Rules: Obama Gives CIA, Military Greater Leeway in Use Against Militants in Yemen*, WALL ST. J., Apr. 26, 2012, at A1 (reporting a shift in U.S. policy on drone use that “includes targeting fighters whose names aren’t known but who are deemed to be high-value terrorist targets or threats to the U.S.”).

<sup>163</sup> Robert H. Jackson, *Final Report to the President Concerning the Nurnberg War Crimes Trial*, reprinted in 20 Temp. L.Q. 338, 343 (1946) (referring to the International Military Tribunal at Nuremberg) [hereinafter Jackson, *Final Report*].

<sup>164</sup> See *supra* notes 40-42 and 55-80 and accompanying text.

<sup>165</sup> Jackson, *Final Report*, *supra* note 163, at 342 (quoting Justice Cardozo).

<sup>166</sup> See Hamdan v. Rumsfeld, 548 U.S. 557, 733 (2006) (Alito, J., dissenting) (“If a particular accused claims to have been unfairly prejudiced by the admission of particular evidence, that claim can be reviewed in the review proceeding for that case. It makes no sense to strike down the entire commission structure based on speculation that some evidence might be improperly admitted in some future case.”).

# DUSTY GALLows: THE EXECUTION OF PRIVATE BENNETT AND THE MODERN CAPITAL COURT-MARTIAL

Lieutenant Commander Stephen C. Reyes\*

This record can be considered as showing a good example of the level of due process which can be attained when an effort is made to carry out the intent of the mandate expressed by Congress in the Uniform Code of Military Justice.

—Court of Military Appeals<sup>1</sup>

May God have mercy on your soul.

—Last words of Private John A. Bennett<sup>2</sup>

## I. Introduction

Fifty years ago, Private John A. Bennett was escorted by prison guards from the Eight Base section of the United States Disciplinary Barracks (USDB) prison to the old power plant where wooden gallows awaited.<sup>3</sup>

His environs at the USDB were far removed from his hometown in Chatham, Virginia, where he was raised by his father, a Virginia sharecropper,

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\*Judge Advocate, U.S. Navy. B.A., University of California, Davis. J.D., University of Pacific. Currently assigned as defense counsel at the Office of the Chief Defense Counsel, Military Commissions. The author would like to thank the following individuals for their tremendous help and expertise in drafting and editing this article: Colonel Dwight Sullivan, USMCR; Colonel Jeffrey Colwell, USMC (ret.); Mr. Richard Kammen; Mr. Michel Paradis; Mr. Jason Grover; Lieutenant Commander Sara de Groot, USN; Lieutenant Commander Hayes Larsen, USN; Lieutenant Peter Ostrom, USN and Lieutenant Laura Bateman, USN

<sup>1</sup> United States v. Bennett, 21 C.M.R. 223, 228 (C.M.A. 1956).

<sup>2</sup> There is some discrepancy as to PFC Bennett's last words. This quotation was taken from the after action report, "Colonel Cox [the Commandant] I want to take this last opportunity to thank you and all of your staff, whoever they may be, for all your help and all you have done for me and all the things you have tried to do for me. May God have mercy on your soul." Captain David J. Anderson, Correspondence to Office of the Provost Marshal General, *Bennett*, 21 C.M.R. 223 (No. 7709) (on file with author).

<sup>3</sup> Richard A. Serrano, *Pvt. John Bennett Is the Only U.S. Soldier Executed for Rape in Peacetime*, L.A. TIMES MAG., Sept. 10, 2000 at 10.

and his mother, who had birthed eight children altogether.<sup>4</sup> Bennett's family had a history of mental illness. His grandfather died in an insane asylum, and his great-uncle was institutionalized for mental problems. Growing up, he would repeatedly hear voices in his sleep and would rise from his bed to follow them.<sup>5</sup> Bennett entered the Army at age eighteen, after only completing a fourth grade level of education.<sup>6</sup> He performed well there, despite being dropped from Ordnance School for academic deficiency.<sup>7</sup> He was eventually stationed in Austria, where the tragic events that led him to the USDB took place. A few minutes past midnight on April 13th, his life—culminating in this walk to the power plant—came to an end.

Seven years earlier, shortly after dusk on December 22, 1954, Bennett took another fateful walk that proved to have disastrous consequences for an innocent eleven year old girl.<sup>8</sup> He was intoxicated and weaving through the streets of Siezenheim, Austria.<sup>9</sup> He wandered aimlessly, entering random homes, looking for a woman named Margaret or Margot.<sup>10</sup> He entered one home asking the occupants if they had chickens.<sup>11</sup> Later that evening, he stumbled upon a girl, the daughter of a local customs official, returning from an errand for her parents.<sup>12</sup> Bennett grabbed her and carried her to a secluded area where he repeatedly raped her, strangled her and then threw her into a nearby millstream.<sup>13</sup> Amazingly, the girl survived.<sup>14</sup> That night Bennett was arrested and taken into military custody.<sup>15</sup>

One month later, he was tried, convicted and sentenced to death by a court-martial.<sup>16</sup> Six years later, he was executed.<sup>17</sup> Since then, the military has yet to carry out another execution.

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<sup>4</sup> A Petition for Clemency in the Court-Martial of John Bennett at 1, *Bennett*, 21 C.M.R. 223 (No. 7709) [hereinafter Petition for Clemency] (on file with author).

<sup>5</sup> *Id.*

<sup>6</sup> History of Accused, *Bennett*, 21 C.M.R. 223 (No. 7709) [hereinafter History of Accused] (on file with author).

<sup>7</sup> *Id.*

<sup>8</sup> *Bennett*, 21 C.M.R at 225.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Record of Trial at 63-65, *Bennett*, 21 C.M.R. 223 (No. 7709) (on file with author).

<sup>12</sup> *Bennett*, 21 C.M.R. at 225.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See *Bennett*, 21 CMR 223.

<sup>17</sup> Chronology of Actions in the General Court-Martial Case of John A. Bennett, at 4, *Bennett*, 21 C.M.R. 223 [hereinafter Chronology of Actions] (on file with author).

In the decades following Bennett's execution the military has continued to hand out death sentences, but no executions have taken place. During these years, the capital court-martial went through a number of dramatic changes. In 1984, Rule for Court Martial (RCM) 1004 was enacted in reaction to *United States v. Matthews*.<sup>18</sup> This rule set out procedures for members to follow before awarding the death sentence.<sup>19</sup> In 1997, life without the possibility of parole became a sentencing option,<sup>20</sup> relieving the members of only being able to choose between death and the possibility of the accused being released.<sup>21</sup> In 2001, Congress mandated that capital courts-martial have at least twelve members on the panel.<sup>22</sup> But in other respects, the capital court-martial remained entirely the same as it did in 1961. For instance, the military still does not require counsel to have specialized training, or even minimum qualifications, in order to represent a capital accused; a growing number of other jurisdictions now do.<sup>23</sup>

This article uses the facts and circumstances surrounding Bennett's case to analyze how it would be handled today, after significant changes to military capital law in the last fifty years. Hopefully, the exercise will provide a "lessons learned" for the future defense of capital cases.

## **II. Pretrial: Would Private Bennett have faced the death penalty today?**

### **A. The Charges**

On the night of December 21, 1954, a few hours after the rape occurred, three members of the 7th Military Police Detachment entered a base

<sup>18</sup> 16 M.J. 354 (C.M.A. 1983) (holding that the Supreme Court opinion in *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), remanded to 229 Ga. 731 (Ga. 1972), which essentially outlawed the death penalty, was applicable to the military). As a whole, *Furman* stood for the proposition that the sentencing procedures at a capital trial must "channel the discretion of sentencing juries in order to avoid a system in which the death penalty would be imposed in a 'wanton' and 'freakish' manner." *Johnson v. Texas*, 509 U.S. 350, 359 (1993) (quoting *Furman*, 408 U.S. at 310 (Stewart, J., concurring)). RCM 1004 was enacted in order to guide the members in their exercise of discretion.

<sup>19</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1004 (2012) [hereinafter MCM].

<sup>20</sup> See National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, §581, 111 Stat. 1629, 1759 (1997) (codified at 10 U.S.C. § 856a (2000)).

<sup>21</sup> See, e.g., *Simmons v. S.C.*, 512 U.S. 154 (1994) (plurality); William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 626-27 (1999) (recognizing members may be compelled to choose death versus life if there is a possibility that the defendant may be released, thereby undermining the reliability of the sentence).

<sup>22</sup> National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 582, 115 Stat. 1012 (2001) (codified at UCMJ art. 25a, 10 U.S.C. § 825a).

<sup>23</sup> See, e.g., 10 U.S.C. § 949a(b)(2)(c)(ii) (2006) (mandating the detailing of learned counsel for capital military commission cases).

theater where Bennett was watching a movie.<sup>24</sup> The three soldiers arrested Bennett and placed him in pretrial custody.<sup>25</sup> Shortly thereafter, he faced charges of attempted murder and rape. The rape charge was the sole capital offense since, like today, the death penalty was not an available punishment for attempted murder.

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At the time of Bennett's court-martial, it was not an anomaly to award the death sentence for rape. In 1951, a court-martial convened in Korea found two service members guilty of the rape of an elderly woman and sentenced them to death.<sup>26</sup> The following year, a court-martial in Germany sentenced two accused to death for multiple rapes and assault with a dangerous weapon.<sup>27</sup> In 1954, the same year as Bennett's trial, another court-martial in Germany sentenced a service member to death for committing multiple rapes.<sup>28</sup>

Between 1930 and 1961, about one third of all military executions were for rape (53/160).<sup>29</sup> In the same general time period, federal and state governments executed 455 people for rape or the rape of a child.<sup>30</sup> The last execution for the rape of a child in the United States occurred in 1964, three years after Bennett's execution.<sup>31</sup> Since Bennett's execution no one has been on the military's death row solely for rape. Today, death row at the USDB is reserved for murderers. As of 2011, there are six service members with an adjudged death sentence; each received a death sentence for committing or attempting to commit multiple murders.<sup>32</sup> The death row that Bennett faced in the 1950s was also predominantly reserved for murderers. During his time at the old USDB, Bennett shared death row with sixteen other service members,

<sup>24</sup> Staff Judge Advocate Recommendation at 6, *United States v. Bennett*, 21 C.M.R. 223 (C.M.A. 1956) (No. 7709) (on file with author).

<sup>25</sup> *Id.*

<sup>26</sup> See *United States v. Marshall*, 6 C.M.R. 450, (A.B.R. 1951).

<sup>27</sup> See *United States v. Freeman*, 15 C.M.R. 76, (C.M.A. 1954).

<sup>28</sup> See *United States v. Parker*, 19 C.M.R. 201 (C.M.A. 1955).

<sup>29</sup> Captain Dwight H. Sullivan, *The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases*, 144 MIL. L. REV. 1, 3 & n.8 (1994).

<sup>30</sup> See *Kennedy v. Louisiana*, 554 U.S. 407, 422 (2008) ("Between 1930 and 1964, 455 people were executed for [rape of a child or adult].")

<sup>31</sup> *Id.* at 433.

<sup>32</sup> *United States v. Loving*, 34 M.J. 956 (A.C.M.R. 1992) (two murders); *United States v. Gray*, 32 M.J. 730 (A.C.M.R. 1991) (two murders and an attempted murder); *United States v. Parker*, 65 M.J. 626 (N-M. Ct. Crim. App. 2007) (two murders); *United States v. Akbar*, 2012 CCA LEXIS 247 (A. Ct. Crim. App. July 13, 2012) (two murders, numerous attempted murders); *United States v. Witt*, 2010 CCA LEXIS 108 (A.F. Ct. Crim. App. Apr. 21, 2010) (two murders and an attempted murder); see also Vance Spath et al., *IS DEATH DIFFERENT? Death Penalty Litigation in the Air Force and the Court-Martial of Senior Airman Andrew Witt*, 34 THE REPORTER 1, 2 (Mar. 2007).

almost all of them convicted for murder.<sup>33</sup> Since Bennett's execution there has, in fact, been only one known capital prosecution for rape alone.<sup>34</sup> In that case, however, the members failed to unanimously find the accused guilty; therefore, death was not an authorized punishment at sentencing.<sup>35</sup> What accounts for the precipitous drop in death sentences for rape after 1961?

For one, the Supreme Court's decision in *Coker v. Georgia*, as applied to the rape of an adult woman, declared the death sentence unconstitutional.<sup>36</sup> The presumption became that *Coker* applied<sup>37</sup> to courts-martial, and it consequently inhibited future convening authorities from seeking death sentences in similar cases. In fact, until a 2005 amendment to the UCMJ,<sup>38</sup> other offenses punishable by death would, by default, be referred as capital unless there were specific instructions stating otherwise. Courts-marital for rape, however, became the exception. After *Coker* (and before the 2005 amendment), practitioners began to treat the charge of rape as non-capital even without special instructions.<sup>39</sup>

*Coker*, however, did not decide the pivotal issue for Bennett's case—whether the death penalty could still be imposed for the rape of a child. It was not until 2008 in *Kennedy v. Louisiana*,<sup>40</sup> that the Supreme Court held that it was unconstitutional.<sup>41</sup> Although there had been prior attempts to limit death

<sup>33</sup> Memorandum for Assistant Judge Advocate General for Military Justice, Disposition of Prisoners on Death Row at Fort Leavenworth at 1-2, United States v. Bennett, 21 C.M.R. 223 (C.M.A. 1956) (No. 7709).

<sup>34</sup> United States v. Straight, 42 M.J. 244, 247 (C.A.A.F. 1995).

<sup>35</sup> *Id.*

<sup>36</sup> *Coker v. Georgia*, 433 U.S. 584 (1977).

<sup>37</sup> The issue of whether *Coker* applied to the military was never squarely decided. Despite this ambiguity, there have been significant hints by the courts that point to *Coker's* application to the military. For instance, in a concurring opinion in *Loving v. United States*, the justices recognized that the constitutional protections afforded to service members facing the death penalty at courts-martial should be equal to that of civilians facing the same predicament. *Loving v. United States*, 517 U.S. 748, 774 (1996). Also, the CAAF has issued language that follows the *Coker* opinion. *United States v. Matthews*, 16 M.J. 333,377. (C.M.A. 1983) (dictum) ("[p]robably [Congress's] intent that death be an optional punishment for rape] cannot be constitutionally effectuated in a case where the rape of an adult female is involved . . . –at least, where there is no purpose unique to the military mission that would be served. . . .").

<sup>38</sup> See MCM, *supra* note 19, R.C.M. 103(2) (2005) ("‘Capital case’ means a general court-martial to which a capital offense has been referred without an instruction that the case be treated as noncapital . . . ."); *United States v. Clark*, 35 M.J. 432, 433 n.1 (C.M.A. 1992) ("There must be a specific statement in the instructions that the case is referred as noncapital for the death penalty to be removed as the maximum punishment."), cert. denied, 507 U.S. 1052 (1993); *See Exec. Order No. 13,387*, 70 Fed. Reg. 60,697 (Oct. 18, 2005) (amending RCM 103(2) and RCM 201(f)(1)(A)(iii)(b)).

<sup>39</sup> See, e.g., *United States v. Clark*, 35 M.J. 432, 433 n.1 (C.M.A. 1992).

<sup>40</sup> *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

<sup>41</sup> As with *Coker*, there is an open question on whether the *Kennedy* opinion applies to the military. This question increased in complexity due to a denial for a petition for a rehearing in the *Kennedy*

sentences for the rape of a child, prior to *Kennedy*, there were no official impediments to courts-martial awarding the death sentences for the rape of a child. For example, in 1984 President Reagan enacted Rule for Courts-Martial (RCM) 1004,<sup>42</sup> which included a provision on the aggravating factor for rape offenses.<sup>43</sup> This provision was enacted specifically to deal with the *Coker* decision.<sup>44</sup> It clearly states that death can only be adjudged if the prosecution proves that either the victim was under the age of 12, or that the accused maimed or attempted to kill the victim.<sup>45</sup> Despite this, there have been no death sentences just for rape since 1961.

Another contributing factor could be that stand-alone rape cases had a difficult time making it past post-trial review with death sentences intact, removing the incentive for the government to seek the death penalty in the first place. Three other cases involving a death sentence for rape which occurred

case sparked by a comment made in the military justice blog “CAAFLOG.” The denial concerned the issue of whether the Court overlooked military justice law in rendering its opinion. In the denial, 554 U.S. 945, 946 (2008), five Justices—Kennedy, Stevens, Souter, Ginsburg and Breyer—issued a statement. In this statement, the justices made a curious observation and seemed to sidestep the issue of *Kennedy*’s application to the military:

This case, too, involves the application of the *Eighth Amendment* to civilian law; and so we need not decide whether certain considerations might justify differences in the application of the *Cruel and Unusual Punishments Clause* to military cases (a matter not presented here for our decision).

*Id.* (citing *Loving v. United States*, 517 U. S. 748, 755, (1996)). There are two things of interest about this statement. First, the Justices cite to the section of the Court’s opinion in *Loving* where the Court assumes (because the government did not contest) the application of its *Furman* opinion to the military. Second, four of the justices —Stevens, Souter, Ginsburg and Breyer—joined in a concurring opinion in *Loving* wherein they state, “when the punishment may be death, there are particular reasons to ensure that the men and women of the Armed Forces do not by reason of serving their country receive less protection than the Constitution provides for civilians.” *Id.* at 774. Not to be outdone, Justice Scalia joined with Chief Justice Roberts, commented that it seems unjust to have service members face different standards for the death penalty merely because they don a uniform:

Second, JUSTICE KENNEDY speculates that the *Eighth Amendment* may permit subjecting a member of the military to a means of punishment that would be cruel and unusual if inflicted upon a civilian for the same crime. That is perhaps so where the fact of the malefactor’s membership in the Armed Forces makes the offense more grievous. One can imagine, for example, a social judgment that treason by a military officer who has sworn to defend his country deserves the death penalty even though treason by a civilian does not. (That is not the social judgment our society has made, see 18 U. S. C. § 2381, but one can imagine it.) It is difficult to imagine, however, how rape of a child could sometimes be deserving of death for a soldier but never for a civilian.

*Kennedy*, 554 U.S. at 948-949 (Scalia, J., concurring).

<sup>42</sup> MCM, *supra* note 19, R.C.M. 1004 analysis, at A21-76.

<sup>43</sup> MCM, *supra* note 19, R.C.M. 1004(c)(9).

<sup>44</sup> MCM, *supra* note 19, R.C.M. 1004(c)(9) analysis, A21-80.

<sup>45</sup> MCM, *supra* note 19, R.C.M. 1004(c)(9).

around the time of Bennett's case, and all had their sentences reduced.<sup>46</sup> All four cases were reviewed by the service specific Board of Review, the Court of Military Appeals, and the President. Each of the other three cases had their sentences overturned or commuted, but Bennett's death sentence remained intact.<sup>47</sup> In *United States v. Parker*, the Court of Military Appeals overturned the appellant's conviction and sentence for the rape of two German women because of cumulative error.<sup>48</sup> In *United States v. Freeman*, the Army Board of Review recommended that the death sentence for two appellants convicted of raping a German woman be commuted to life in prison.<sup>49</sup> In *United States v. Marshall*, the CMA affirmed the death sentence for rape, but believed that it was inappropriate for it to actually be carried out.<sup>50</sup> Furthermore, President Eisenhower eventually commuted each of these death sentences down to confinement and hard labor for only twenty five years.<sup>51</sup>

Lastly, the lack of death sentences for rape could also be viewed as a changing attitude in the military toward regarding the use of capital punishment for non-murder offenses. Generally, the military reserves the death penalty for cases that can be justified by the doctrine of *lex talionis*—i.e., an eye for an eye.

It stands to reason that if Bennett had been prosecuted today, he would not have faced the death penalty.<sup>52</sup> Today, a convening authority would likely not even refer the charges capitally. But even if they did, the members would still be would be extremely hesitant to award a death sentence.

The recent removal of the provision “punishable by death” from the new Article 120b the court-martial offense of rape of a child evinces Congress’s intent to preclude the use of the death sentence for a lone rape offense.<sup>53</sup> Historically, in order for an offense to be punishable by death Congress must

<sup>46</sup> *United States v. Parker*, 19 C.M.R. 201, 214 (C.M.A. 1955); *United States v. Freeman*, 15 C.M.R. 76, 79 (C.M.A. 1954); *United States v. Marshall*, 6 C.M.R. 450, 454 (A.B.R. 1951).

<sup>47</sup> One side issue that arises is why did Bennett's death sentence remain intact? What was different about his case? Could race have been a factor? However, Parker was black and he raped two German women. But Parker's sentence was not commuted, it was overturned on appeal. The most likely and plausible reason was that Bennett's victim was a child while the other cases involved adult females. However, President Eisenhower commuted a death sentence of an accused who was convicted of murdering and raping a five year old Japanese child. See *United States v. Hurt*, 22 C.M.R. 630 (1956).

<sup>48</sup> *Parker*, 19 C.M.R. at 214 (C.M.A. 1955).

<sup>49</sup> *Freeman*, 15 C.M.R. at 79 (C.M.A. 1954).

<sup>50</sup> *Marshall*, 6 C.M.R. at 454 (A.B.R. 1951).

<sup>51</sup> *Id.* at 454.

<sup>52</sup> See, e.g., *United States v. Ronghi*, 60 M.J. 83, 84 (C.A.A.F. 2004). In *Ronghi*, the accused pled guilty to the premeditated murder of a child and received LWOP. The convening authority referred the charges as non-capital in part because of the availability of LWOP.

<sup>53</sup> MCM, *supra* note 19, pt IV, ¶45b.

specifically state that it is.<sup>54</sup> Under the new statute, however, rape of a child is only punishable “as a court-martial may direct.” Thus, per the language of the statute, it would seem that Bennett would not face the death penalty today for his crimes.<sup>55</sup>

## B. Competency Examination

The day after PFC Bennett's Article 32, he was sent to the U.S. Army Hospital in Salzburg for a competency examination, a psychiatric evaluation, and other medical tests.<sup>56</sup> At this time, Bennett took an intelligence quotient (IQ) test called the Wechsler-Bellevue.<sup>57</sup> He scored a 67,<sup>58</sup> placing him in the bottom 3rd percentile of the population in regards to intellectual functioning.<sup>59</sup> Today, this test result would be viewed as a significant red flag that Bennett may have been mentally retarded.

...

In *Atkins v. Virginia*,<sup>60</sup> the Supreme Court held that it was unconstitutional to sentence someone who is mentally retarded to death. The Court held that the impairments of the mentally retarded can “jeopardize the reliability and fairness of capital proceedings against [these] defendants.”<sup>61</sup>

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<sup>54</sup> MCM, *supra* note 19, R.C.M. 201(f)(1)(A)(iii).

<sup>55</sup> Congress went further in the statute to explain that the maximum punishment for the rape of a child will be “published in subsequent Executive order.” MCM, *supra* note 19, pt IV, ¶45b analysis, at A23-16. However, the President’s treatment of rape of a child in the list of aggravating factors in RCM 1004 seems to contradict Congress’s removal of the “punishable by death” language from the statute. Namely, absent the provision “punishable by death” a statute does not authorize the death penalty for the offense. See, e.g., United States v. Tanner, 61 M.J. 649, 651 n.4 (N.M. Ct. Crim. App. 2005). Since the new Article 120b is missing the operative language the death penalty is not an available punishment. Under RCM 1004, however, the age (12) of the rape victim and whether the accused maimed or attempted to kill the rape victim is—despite the removal of the operative language in the statute—still listed as an aggravating factor that if found beyond a reasonable doubt by all the members may open the gate to awarding the death penalty. MCM, *supra* note 19, RMC 1004(c)(9).

<sup>56</sup> Chronology of Actions, *supra* note 17, at 1.

<sup>57</sup> Motion for Further Psychiatric Examination and Motion for Enlargement of Time at 1, United States v. Bennett, 21 C.M.R. 223 (No. 7709) (on file with author).

<sup>58</sup> The evidence that Bennett took an IQ test was found in a motion by his appellate defense counsel for further psychiatric evaluation. A Wechsler-Bellevue Test revealed an IQ of 67, which is definitely in the borderline area and is in fact only two numerical points over the level of mental deficiency. Motion for Further Psychiatric Examination and Motion for Enlargement of Time at 1, *Bennett*, 21 C.M.R. 223 (No. 7709) (on file with the author). Unfortunately, the actual results from the Wechsler-Bellevue test are not in the official record.

<sup>59</sup> See *Atkins v. Virginia*, 536 U.S. 304, 309 n.5 (2002) (citing B. Sadock & V. Sadock, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, 2952 (7th ed. 2000)).

<sup>60</sup> *Id.* at 304.

<sup>61</sup> *Id.* at 306-07.

Furthermore, the Court highlighted the fact that mentally retarded defendants as a whole face a special risk of wrongful execution.<sup>62</sup> Specifically, they “may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.”<sup>63</sup>

Whether *Atkins* applies to courts-martial is still an unresolved question, as is the procedure for determining mental retardation at courts-martial. However, five years after *Atkins*, the Navy-Marine Corps Court of Appeals provided a partial answer. The court held in *United States v. Parker*<sup>64</sup> that *Atkins* applied to the imposition of the death penalty in the Navy and Marine Corps.<sup>65</sup> The court also adopted the definition of mental retardation used by the American Association on Intellectual and Developmental Disabilities (formerly the American Association for the Mentally Retarded)(AAIDD). “Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. The disability originates before age 18.”<sup>66</sup>

Further, the defense has the burden of proving mental retardation by a preponderance of the evidence.<sup>67</sup> With respect to Parker’s facts, the court held that a hearing “conducted by a military judge, for the purpose of developing the evidence on the issue of mental retardation and making appropriate factual determinations is required.”<sup>68</sup>

The *Parker* case is not directly applicable at the trial level since it involves a claim of mental retardation made post-trial and during direct appellate review. So the exact procedures on how to determine mental retardation at the trial level remain unresolved.<sup>69</sup> The *Parker* case, however, does provide helpful guidelines, such as the use of the AAIDD standard. Per the AAIDD, the diagnosis of mental retardation is based upon three criteria: (1)

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<sup>62</sup> *Id.* at 320.

<sup>63</sup> *Id.* at 320-21.

<sup>64</sup> *United States v. Parker*, 65 M.J. 626, 629 (N-M. Ct. Crim. App. 2007).

<sup>65</sup> *Id.* (“By the plain language of the *Atkins* decision, we are directed to seek a standard for defining mental retardation in the military justice system that ensures that the level of mental impairment that will qualify as mental retarded is one which would receive national consensus among the various state and Federal jurisdictions.”)

<sup>66</sup> *Id.* at 629 (citing AMERICAN ASS’N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (Ruth Luckasson ed., 10th ed. 2002)).

<sup>67</sup> *Id.* at 630.

<sup>68</sup> *Id.*

<sup>69</sup> See generally Jessica Hudson, *Lightning But No Thunder: The Need for Clarity in Military Courts Regarding the Definition of Mental Retardation in Capital Cases And For Procedures in Implementing Atkins v. Virginia*, 55 NAVALL. REV. 359 (2008) (proposing a procedure to be used in the military for adjudicating *Atkins* claims).

significant limitations in intellectual functioning; (2) significant limitations in adaptive behavior; and (3) the origin of these impairments prior to the age of 18.<sup>70</sup>

*Significant Limitations to Intellectual Functioning.* Today, a key indicator of significant limitations to intellectual functioning is a full-scale IQ score of 70 to 75 or below.<sup>71</sup> Under the Diagnostic and Statistical Manual of Mental Disorders, Text Revision (DSM-IV-TR) a person with such an IQ is generally capable of a sixth grade level of academic achievement.<sup>72</sup> Bennett scored a 67 on the Wechsler-Bellevue test which placed him significantly below what a person with average intelligence would score.<sup>73</sup> Under this test, a person of an IQ score of 67 fell under the category of borderline.<sup>74</sup> Significantly, this score was only 2 points away from the category of mentally defective.<sup>75</sup> In relation to the population, Bennett's score placed him in the bottom 3rd percentile and well within the realm of mentally defective.<sup>76</sup>

The Wechsler-Bellevue test was the precursor to the Wechsler Adult Intelligence Scales Test (WAIS)<sup>77</sup> which eventually became the WAIS I, II and III. The WAIS is the standard instrument in the United States for assessing intellectual functioning.<sup>78</sup> Under the original WAIS, a score below 70 placed a person in the category of mentally defective.<sup>79</sup> However, the scores for the Wechsler-Bellevue do not translate directly to the WAIS test. Nonetheless, the simple fact that Bennett's test score was strikingly low, which placed him in the realm of mentally retarded (defective), should give us reasons to entertain the possibility that he may have had significant limitations to his intellectual functioning.

<sup>70</sup> AMERICAN ASSOCIATION ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, & SYSTEMS OF SUPPORTS, 7 (11th ed. 2010)[hereinafter AAIDD].

<sup>71</sup> See Atkins v. Virginia, 536 U.S. 304, 309 n.5 (2002).

<sup>72</sup> AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 43 (4th ed. Text Revision 2000)[hereinafter DSM-IV-TR].

<sup>73</sup> DAVID WECHSLER, THE WECHSLER-BELLEVUE INTELLIGENCE SCALE, 8 (1946). Under the Wechsler-Bellevue Scale the clinical ratings for IQ were: 65 and below, mental defective; 66-79 borderline; 80-90 dull normal; 91-110 average; 111-119 bright normal; 120-127 superior. 128 and above very superior.

<sup>74</sup> Id.

<sup>75</sup> Id.

<sup>76</sup> See, e.g., DAVID WECHSLER, THE MEASUREMENT & APPRAISAL OF ADULT INTELLIGENCE, 41 (4th ed. 1958). (discussing the Wechsler Adult Intelligent Scales Test (WAIS) which replaced the Wechsler-Bellevue Test. Under the WAIS the clinical ratings for IQ were (ages 16 to 75): 69 and below, defective; 70-79 borderline; 80-89 dull normal; 90-109 average; 110-119 bright normal; 120-129 superior; 130 and above, very superior).

<sup>77</sup> Id.

<sup>78</sup> Atkins v. Virginia, 536 U.S. 304, 309 n.5 (2002).

<sup>79</sup> See, Wechsler, *supra* note 76.

*Significant Limitations to Adaptive Functioning and Onset Prior to Age*

18. Granted, test scores alone do not make the case for mental retardation. A person must also display significant limitations to his adaptive functioning, and absent such limitations a person with an IQ less than 70 would not be diagnosed as mentally retarded.<sup>80</sup>

Essentially, adaptive functioning is meant to describe the everyday skills that are required for a person to care for himself and to live within a community.<sup>81</sup> It is defined as "the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives."<sup>82</sup> Conceptual skills include a person's use of language, reading and writing. Social skills encompass interpersonal skills, social responsibility, self-esteem, gullibility and social problem solving.<sup>83</sup> Practical skills include personal daily activities and occupational skills.<sup>84</sup> Lastly, in order for a person to be diagnosed as mentally retarded, these impairments must appear prior to the age of 18.<sup>85</sup> The purpose of this last prong is to recognize that mental retardation is a developmental disability. Its onset during a person's developmental period distinguishes it from other conditions such as traumatic brain injury.<sup>86</sup>

Overall, ascertaining whether a person is mentally retarded is a multifaceted discovery process that requires a comprehensive and thorough investigation into an individual's life history. It requires extensive interviews of an individual's family, school teachers, counselors or any other people of interest, as well as, an exhaustive review of documentary evidence.<sup>87</sup> Most importantly, the focus in the assessment is not on what the person does well, but on his limitations.<sup>88</sup> In other words, mental retardation "can never be ruled out on the basis of what a client can do well."<sup>89</sup>

In Bennett's case, we are left with only the written record: a lifeless trail that is hardly adequate or thorough. Nonetheless, there are some hints that are worth exploring:

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<sup>80</sup> DSM-IV-TR, *supra* note 72, at 42.

<sup>81</sup> AAIDD, *supra* note 70, at 7.

<sup>82</sup> *Id.* at 45.

<sup>83</sup> *Id.* at 44.

<sup>84</sup> *Id.*

<sup>85</sup> INTERNATIONAL JUSTICE PROJECT, A PRACTITIONER'S GUIDE TO DEFENDING CAPITAL CLIENTS WHO HAVE MENTAL RETARDATION/INTELLECTUAL DISABILITY, 17 (3rd ed. 2010) [hereinafter PRACTITIONER'S GUIDE].

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 25-31 (presenting an illustrative list of the areas of investigation).

<sup>88</sup> *Id.* at 17.

<sup>89</sup> *Id.*

*Medical History.* Bennett's father and mother were both in poor health.<sup>90</sup> His mother's health, however, is the most interesting. In a Red Cross interview, Bennett's mother stated that she "nearly died" when Bennett was born.<sup>91</sup> She complained that after his birth she "had a fit," was unconscious for a period of time, and remained hospitalized inside her home for months.<sup>92</sup> Also, there was evidence that she had chronic hypertension.<sup>93</sup>

Other family members also suffered from illnesses. Bennett's brother was discharged from the Army for persistent nose bleeds and "head trouble."<sup>94</sup> Specifically, there was a history of mental illness in his family—his grandfather died in an insane asylum and his uncle was institutionalized.<sup>95</sup>

As for Bennett's medical history, the information is scarce. We know that, as a child, he would "hear voices in his sleep" and would try and follow the voices around.<sup>96</sup> He was still wetting the bed when he entered school.<sup>97</sup> He began drinking corn liquor at the age of thirteen and frequently got drunk on aspirin and wine.<sup>98</sup>

There is also evidence that he suffered from epilepsy<sup>99</sup>—which is a known risk factor of mental retardation.<sup>100</sup> The AAIDD, in its publication *Intellectual Disability: Definition, Classifications, and Systems of Supports*,<sup>101</sup> discusses risk factors that are frequently associated with mental retardation.<sup>102</sup> The risk factors are separated into stages that are likely to have an effect on a person's development. The stages are: prenatal (conception to birth), perinatal (three months before, to one month after, birth) and postnatal (birth and during developmental period).<sup>103</sup> Among the postnatal stage factors are seizure disorders.<sup>104</sup>

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<sup>90</sup> History of Accused, *supra* note 6, at 1.

<sup>91</sup> Serrano, *supra* note 3, at 11.

<sup>92</sup> *Id.* (Bennett was born in the spring and his mother states she did not get out of the house until the next fall).

<sup>93</sup> Petition for Clemency, *supra* note 4, at 4.

<sup>94</sup> *Id.*

<sup>95</sup> Serrano, *supra* note 3, at 11.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 10.

<sup>100</sup> PRACTITIONER'S GUIDE, *supra* note 85, at 31-33.

<sup>101</sup> AAIDD, *supra* note 70, at 60.

<sup>102</sup> PRACTITIONER'S GUIDE, *supra* note 85 at 31-33.

<sup>103</sup> *Id.* at 33.

As a child, Bennett would have “spells” or “blind staggers.” His mother attributed them to epilepsy.<sup>104</sup> He described them as “dizzy spells.”<sup>105</sup> In order to cure these spells, he would self-medicate by drinking alcohol.<sup>106</sup>

After Bennett’s initial competency evaluation in Salzburg, the trial counsel and Staff Judge Advocate (SJA)—acting on the recommendation from a psychiatrist who examined Bennett—asked for Bennett to be transferred to the Army Hospital in Landstuhl, so that Bennett could undergo another competency examination and receive psychological and other medical tests.<sup>107</sup> During this examination, the medical board questioned Bennett about the “blind staggers.”<sup>108</sup> An Electroencephalogram (EEG) of Bennett revealed “borderline abnormal electroencephalogram, due to the presence of four to five per second slow waves frontal region.”<sup>109</sup> But the board found insufficient evidence to entertain the diagnosis of epilepsy and stated:

In spite of the lack of adequate findings to substantiate a neurological diagnosis; in the remote event that the above described spells do in fact represent some form of epileptic equivalent seizures, it is not felt that his conduct as reported on the date of the offense could even remotely be considered an epileptic seizure. . . .<sup>110</sup>

No evidence of Bennett’s “blind spells” was introduced at his court-martial.

Five years later, while Bennett was on death row, a Board of Medical Officers convened at the USDB to examine him.<sup>111</sup> Contrary to the previous medical board’s findings in Salzburg, this board diagnosed Bennett with epilepsy and commented that there was a reasonable doubt as to whether Bennett was sane at the time of the offense.<sup>112</sup> As a result, the board recommended that Bennett’s sentence be commuted to life in prison.<sup>113</sup> The Office of the Surgeon

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<sup>104</sup> Serrano, *supra* note 3 at 11.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Memorandum Regarding Release Prisoner from Confinement to Commanding Officer, USFA Area Command from Captain Howard Vincent, Trial Counsel, United States v. Bennett, 21 C.M.R. 223 (C.M.A. 1956) (No. 7009) (on file with author).

<sup>108</sup> Motion for Further Psychiatric Examination and Motion for Enlargement of Time at 2, *Bennett*, 21 C.M.R. 223 (No. 7009) (on file with author).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Petition for Clemency, *supra* note 4, at 3.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

General reviewed the board's findings and disagreed with the recommendation.<sup>114</sup>

One month after the board issued its report, two members of the USDB medical board testified at a District Court hearing in Kansas on Bennett's habeas petition. Both doctors stated that the board did not "intend to hold that Bennett was legally insane at the time of the offense."<sup>115</sup> Instead, the report was meant to be a plea for clemency based on the "medical possibility that Bennett was under epileptic seizures when the offenses were committed."<sup>116</sup> Bennett testified at this hearing. This is the only evidence in the record of Bennett testifying since he did not make a statement at his court-martial. He gave his testimony in short, halting statements. "He mumbled his answers and was difficult to understand . . . and he well portrayed himself as an individual of low intelligence."<sup>117</sup>

In addition to seizures, he had other known risk factors during the postnatal stage, such as his family's poverty and the inadequate special education services at the time.<sup>118</sup> Bennett grew up poor with his seven brothers and sisters.<sup>119</sup> He dropped out of school after only completing a fourth grade level and the record does not indicate that he received any special education services during his short stay.<sup>120</sup> These risk factors, in combination with his seizures, are frequently associated with mental retardation.<sup>121</sup>

*Academic Achievement.* Bennett left school at the age of fifteen having attained a fourth grade level.<sup>122</sup> Prior to entering the Army, he had completed only six years of schooling.<sup>123</sup> There are no school records contained in the official record of trial, so we do not know how he performed or why he dropped out. Nor do we know why at age fifteen he had only reached fourth grade, a level that is normally reached by age nine. Yet this comports with the assertion

<sup>114</sup> Fact Sheet from the Office of the Judge Advocate General, Military Justice Division, Lt Col Birch/56433, Subject: White House Briefing in the Case of Prisoner John A. Bennett at 1, *Bennett*, 21 C.M.R. 223 (No. 7009) (on file with author).

<sup>115</sup> Memorandum For Chief, Military Justice Division Subject: District Court hearing in PFC John A. Bennett case, *Bennett*, 21 C.M.R. 223 (No. 7009) (on file with author).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 3.

<sup>118</sup> See Serrano, *supra* note 3, at 11 (describing Bennett as an "indigent" son and noting that his father worked in menial jobs).

<sup>119</sup> *Id.*

<sup>120</sup> See generally Record of Trial, *supra* note 11.

<sup>121</sup> PRACTITIONER'S GUIDE, *supra* note 85, at 33 n. 63.

<sup>122</sup> History of Accused, *supra* note 6, at 1.

<sup>123</sup> Petition for Clemency, *supra* note 4, at 1.

that an individual with his IQ is generally only capable of functioning at a sixth grade level.<sup>124</sup>

There is, however, a letter of clemency in the record from one of his teachers.<sup>125</sup> In the letter, she does not comment about Bennett's academic performance, but states that "[h]e was always well behaved and well mannered. I found him to be honest and truthful. He always got along with his classmates well and with his friends in his adult life."<sup>126</sup> His teacher's view seems countered by his family, "[h]e played with the crowd until he got mad. . . ."<sup>127</sup> The only other evidence of Bennett's academic performance was his score on the Army General Classification Test (AGCT)<sup>128</sup> where he was placed in category 2 (1 being the best and 5 as the worst), and his performance at Army's Ordnance School.<sup>129</sup> As for the AGCT, his performance seems to belie the claim that he was mentally retarded.<sup>130</sup> But as a general aptitude test, the AGCT should not be viewed in place of a legitimate IQ test such as the WAIS; instead,

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<sup>124</sup> DSM-IV-TR, *supra* note 72, at 43.

<sup>125</sup> Letter Requesting Clemency from Ms. Bertha Banks, United States v. Bennett, 21 C.M.R. 223 (C.M.A. 1956) (No. 7009) (on file with author).

<sup>126</sup> *Id.*

<sup>127</sup> Serrano, *supra* note 3, at 12.

<sup>128</sup> See ULYSSES LEE, UNITED STATES ARMY IN WORLD WAR II, SPECIAL STUDIES: THE EMPLOYMENT OF NEGRO TROOPS 241-248 (Center of Military History U.S. Army 1966).

The AGC test contained three kinds of tasks: first, 'verbal items of increasing difficulty, sampling the person's grasp of the meaning of words and their differences; second, items involving solution of arithmetical problems and mathematical computations; third, items requiring ability to visualize and think about relationships of things in space.' It attempted to measure the effects of at least four elements influencing the rate of learning: (1) native capacity, (2) schooling and educational opportunities, (3) socioeconomic status, and (4) cultural background.

*Id.* at 241.

That it measured native intelligence alone or completely, Dr. Walter V. Bingham, Chief Psychologist of the Classification and Replacement Branch of The Adjutant General's Office, denied:

It does not measure merely inherent mental capacity. Performance in such a test reflects very definitely the educational opportunities the individual has had and the way in which these opportunities have been grasped and utilized. Educational opportunities do not mean schools merely. Learning goes on about the home, on the playground, at work, when one reads a newspaper, listens to a radio, or sees a movie. There is nothing in the title of the Army test that says anything about native intelligence. It is a classification test. Its purpose is to classify soldiers into categories according to how ready they are to pick up soldiering how likely they are to learn easily the facts, skills, and techniques necessary for carrying out Army duties.

*Id.*

<sup>129</sup> History of Accused, *supra* note 6, at 2.

<sup>130</sup> See PRACTITIONER'S GUIDE, *supra* note 85, at 13 n.4.

it should be viewed as a screening tool.<sup>131</sup> Also, compare this to Bennett's performance at Ordnance school, where he was dropped after ten weeks of schooling for "academic deficiency."<sup>132</sup>

*Work Performance.* Bennett's job in the army was as a truck driver. He would break down rations, pick them up, and then deliver them.<sup>133</sup> His command felt that he was a tremendous morale builder who kept the other men in good spirits by keeping them "laughing and joking all the time."<sup>134</sup> In short, Bennett's job performance, per his commanding officer's (CO's) ratings was excellent as to character and efficiency.<sup>135</sup> There are, however, two possible explanations to reconcile this apparent difference between mental capacity and job performance ratings. First, the military is an atypical environment insofar as it is highly structured. In this environment, so long as the demands do not become too complex, a person with mental disabilities can have some degree of success.<sup>136</sup> Second, the job that Bennett was called upon to do was rather simple and mundane—he delivered rations.<sup>137</sup> A person of Bennett's IQ can function at a sixth grade level; therefore, the less complex the job the more likely it is for that person to perform it well.<sup>138</sup> The most compelling evidence that places Bennett's performance in perspective is the opinion of his CO. He states, "prior to this offense, I personally believed that this man was an asset to the unit and a morale factor. He was always joking, not in a wise attitude, but he had a jovial manner."<sup>139</sup> A few years after Bennett was convicted and awaiting execution, the CO wrote in a letter of clemency, "[h]e was not an intelligent man and at times evidenced immaturity. . . I believe that Private Bennett is neither inherently criminal in instincts or vicious by nature. I believe his crime was unpremeditated and directly traceable to an immature mentality and alcohol-inflamed passion."<sup>140</sup>

*Was Bennett mentally retarded?* Bennett's record portrays a person with limited intelligence, but it is not clear on its face whether he was mentally retarded. Unfortunately, there are more questions than answers. Without an adequate investigation coupled with an assessment by a mental health expert, a

<sup>131</sup> *Id.* ("Recorded 'IQ scores' obtained, for example, during military service or in institutional settings like schools, hospitals and detention facilities, often are not individually administered, but rather are group measures intended to provide a rough assessment of intelligence.")

<sup>132</sup> History of Accused, *supra* note 6, at 2.

<sup>133</sup> Record of Trial, *supra* note 11, at 362.

<sup>134</sup> *Id.* at 363.

<sup>135</sup> History of Accused, *supra* note 6, at 2.

<sup>136</sup> PRACTITIONER'S GUIDE, *supra* note 85, at 30.

<sup>137</sup> See Serrano, *supra* note 3, at 10.

<sup>138</sup> See PRACTITIONER'S GUIDE, *supra* note 85, at 13 n.4.

<sup>139</sup> Record of Trial, *supra* note 11, at 367.

<sup>140</sup> Letter Requesting Clemency from Captain William Fuller, United States v. Bennett, 21 C.M.R. 223 (C.M.A. 1956) (No. 7009) (on file with author).

true answer cannot be given. Yet, his inauspicious upbringing, his seizures as a child, and the abnormal medical history of his family members—his mother's complications with his birth, his grandfather's and uncle's institutionalization and his brother's head problems—all provide extensive circumstantial evidence. Also, when asked to describe Bennett, every person seems to describe him as a child—one who may be seeking to get by through his good humor and joviality. For instance, when it came to appraising Bennett, his supervisors described him as good natured, laughing and joking all the time, rather than speaking to his professional abilities.<sup>141</sup> Bennett's teacher described him as an honest person who gets along well with his friends, rather than describing his intellectual abilities.<sup>142</sup> In fact, it seems as if all the praise was centered on Bennett's personality, and none of it on his abilities. When asked to appraise Bennett on his intellect, his CO stated Bennett was not an intelligent man and had an immature mentality.<sup>143</sup>

Although the answer to whether Bennett was mentally retarded may be lost forever, what can be safely asserted is that if Bennett had been prosecuted today, there would be ample reason to investigate the matter further. Today, Bennett's counsel would have conducted such an examination with mitigation in mind and delved much further into this area. As will be discussed later, a thorough life history investigation may have provided more evidence of his mental retardation, or it may have revealed other evidence—e.g., organic brain damage—that could have been presented at sentencing.

### **III. The Court-Martial: Would a finder of fact today have sentenced Private Bennett to death?**

Bennett was represented at his trial by a single attorney and a defense assistant—an officer who was not a lawyer.<sup>144</sup> His trial commenced one month after the date of the offense,<sup>145</sup> a timeline that was not atypical for that period. For instance, in 1951, two service members were tried and sentenced to death

<sup>141</sup> See *id.*

<sup>142</sup> See Letter requesting clemency from Mrs. Bertha Banks, *supra* note 125.

<sup>143</sup> Letter request clemency from Captain William Fuller, *supra* note 140.

<sup>144</sup> See Record of Trial, *supra* note 11, at 3. Today, the same criteria apply. A capital accused is only required to be represented by one counsel. See generally UCMJ, art. 27 (2012). However, in practice more than one counsel is detailed. As in 1955, there are no minimum qualifications for a defense counsel to represent a capital client, other than those under Article 27(b). *Id.* The military has decided not to establish these requirements despite the fact that the federal government, military commissions and the overwhelming majority of states that authorize the death penalty require minimum qualifications for capital counsel. See 18 U.S.C. § 3005 (1984) (learned counsel in federal capital cases required); 10 U.S.C. § 949a(b)(c)(ii) (2006) (learned counsel required in capital military commissions); see also Stephen Reyes, *Left Out in the Cold: The Case for a Learned Counsel Requirement in the Military*, ARMY LAW., Oct. 2010, at 4.

<sup>145</sup> Chronology of Actions, *supra* note 17, at 1.

two months after the date of the crime;<sup>146</sup> in 1954, a service member was sentenced to death only fourteen days after he committed his crime.<sup>147</sup> Today, on the other hand, it takes on average two years to try a capital court-martial.<sup>148</sup>

#### A. Voir Dire.

Voir dire in Bennett's case was perfunctory. It consisted of only a handful of questions, with Defense Counsel focusing on whether the members had any prior knowledge of the case.<sup>149</sup> He did ask one member whether the fact that "the accused was a member of the Negro race [would have] any influence upon [his] decision . . . ?"<sup>150</sup> The member answered that it would not.<sup>151</sup>

Even though Bennett faced the death penalty, the only inquiry about the member's views on the death penalty came from the Trial Counsel who asked one simple question: did the members have any conscientious or religious scruples against awarding the death sentence?<sup>152</sup> All members answered that they did not.<sup>153</sup>

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<sup>146</sup> See *United States v. Marshall*, 6 C.M.R. 450 (A.B.R. 1951) (offense was committed on May 13, 1951 and the sentence was adjudged on July 17, 1951).

<sup>147</sup> See *United States v. Freeman*, 8 C.M.R. 386 (A.B.R. 1953) (offense was committed on October 21, 1952 and the sentence was adjudged on November 4, 1952).

<sup>148</sup> However, it was not until recently that this average could be measured in years. *See, e.g.*, *United States v. Curtis*, 28 M.J. 1074, 1076-78 (N.M. Ct. Crim. App. 1989) (accused given a death sentence four months after the offense occurred); *United States v. Kreutzer*, 59 M.J. 773, 807 (A. Ct. Crim. App. 2004) (sentenced eight months from the date of the crime); *United States v. Quintanilla*, 60 M.J. 852, 854 (N.M. Ct. Crim. App. 2005) (sentenced nine months from the date of the crime). Of the ten death sentences that have gone through direct appellate review since 1984, the average length between the offense and the sentence was eight months. *United States v. Loving*, 41 M.J. 213, 234 (C.A.A.F. 1994) (4 months); *United States v. Gray*, 51 M.J. 1, 9-13 (C.A.A.F. 1999) (14 months); *United States v. Dock*, 35 M.J. 627 (A.C.M.R. 1992) (5 months); *United States v. Murphy*, 50 M.J. 4 (C.A.A.F. 1998) (6 months); *United States v. Thomas*, 46 M.J. 311 (C.A.A.F. 1997) (10 months); *United States v. Simoy*, 50 M.J. 1 (C.A.A.F. 1998) (7 months); *United States v. Curtis*, 46 M.J. 129 (C.A.A.F. 1997); *United States v. Kreutzer*, 59 M.J. 773 (A.Ct.Crim.App. 2004); *United States v. Quintanilla*, 60 M.J. 852 (N.M. Ct. Crim. App. 2005); *United States v. Walker*, 66 M.J. 721 (N.M. Ct. Crim. App. 2008) (16 months). Out of those ten cases, eight of them have been reversed on appeal. *Loving* (4 months) and *Gray* (14 months) have not been overturned.

<sup>149</sup> See Record of Trial, *supra* note 11, at 4-10.

<sup>150</sup> *Id.* at 9.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 4.

<sup>153</sup> *Id.*

Since Bennett's trial, the Supreme Court has set constitutional limits on who qualifies to sit on a capital jury. In *Witherspoon v. Illinois*,<sup>154</sup> the Court held: "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."<sup>155</sup> In other words, that the state cannot exclude persons with mere reservations about imposing the death penalty cannot be excluded from the jury so long as they can put aside those scruples and at least *consider* imposing the death sentence.

Subsequently, in *Wainwright v. Witt*,<sup>156</sup> the Court further clarified the juror exclusion standard in capital cases as, "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"<sup>157</sup> A person with absolutist views on the death penalty—either for or against—may be excluded because these views substantially impair their ability to mete out a meaningful sentence in accordance with the evidence presented.<sup>158</sup> More importantly, counsel need not prove these absolutist views by "unmistakable clarity" in order to have a member excused.<sup>159</sup>

Lastly, in *Morgan v. Illinois*,<sup>160</sup> the Court discussed the role that voir dire plays in discerning a juror's views on capital punishment and mitigation evidence.<sup>161</sup> The Court held that "part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors."<sup>162</sup> As to what constitutes an adequate voir dire, the Court held that there should be a meaningful inquiry into the juror's views on the death penalty.<sup>163</sup> In making this inquiry, general fairness and "follow the law" questions are not enough. Such talis manic questions do not suffice because:

It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or

<sup>154</sup> 391 U.S. 510 (1968).

<sup>155</sup> *Id.* at 522.

<sup>156</sup> 469 U.S. 412 (1985).

<sup>157</sup> *Id.* at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

<sup>158</sup> *Id.* at 424-27; see also *Morgan v. Illinois*, 504 U.S. 719 (1992) (affirming the proposition that jurors who are "unalterably in favor of, or opposed to, the death penalty in every case . . . by definition are ones who cannot perform their duties in accordance with the law.").

<sup>159</sup> *Witt*, 469 U.S. at 424.

<sup>160</sup> 504 U.S. 719 (1992).

<sup>161</sup> See *id.*

<sup>162</sup> *Id.* at 729.

<sup>163</sup> See *id.* at 735-36.

her from doing so. A defendant on trial for his life must be permitted on *voir dire* to ascertain whether his prospective jurors function under such misconception.<sup>164</sup>

With respect to mitigation evidence, *Morgan* holds that capital jurors who cannot give meaningful consideration to mitigation evidence are excludable.<sup>165</sup> It does not require that jurors give weight to mitigation evidence, merely that jurors consider the mitigation evidence.<sup>166</sup>

Military courts have largely followed these dictates and have recognized that jury selection in capital trials is different from normal courts-martial.<sup>167</sup> For instance, in *United States v. Gray*,<sup>168</sup> the CAAF used the test set out in *Witt* to affirm a military judge's removal of two members: one who said that the likelihood of him voting for death was "very remote" and another who answered that he could never vote for death.<sup>169</sup> But with respect to the adequacy of *voir dire* or the mitigation impaired member, military appellate courts have not, as of yet, faced these issues directly.<sup>170</sup>

In Bennett's case, missing from the *voir dire* was any substantive inquiry about the members' views on the death penalty. The only relevant question was the perfunctory one from trial counsel of whether the members had any conscientious or religious scruples against it.<sup>171</sup> However, this line of questioning can fairly be categorized under the rubric of "death qualification."<sup>172</sup> In other words, it is essentially a question of whether the member can follow the law and impose the death sentence. In that respect, the question is more of a

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 738-39, 744 n. 3 (Scalia, J., dissenting).

<sup>166</sup> *Id.*

<sup>167</sup> See, e.g., *United States v. Curtis*, 44 M.J. 106, 119 (1996) (citing *Morgan v. Illinois*, 504 U.S. 719, 727-731 (1992)) ("There is no question that capital trials differ at many stages from non-capital cases as to jury selection . . . .")

<sup>168</sup> 51 M.J. 1 (1999).

<sup>169</sup> *Id.* at 32.

<sup>170</sup> In *United States v. Taylor*, 41 M.J. 701, 704 (A. F. Ct. Crim. App. 1995), the appellant argued that the military judge erred by failing to ask whether any of the members would automatically award the death sentence. The court held that this issue was inapposite because the appellant did not receive a death sentence; however, the court stated that *Morgan* was distinguishable from this case because trial defense counsel was free to conduct *voir dire* and failed to ask any *Morgan* type questions. *Id.* Conversely, in *Morgan*, the judge conducted the *voir dire* and refused to ask the question about whether the jurors held any absolutist views on the death penalty. 504 U.S. at 723.

<sup>171</sup> Record of Trial, *supra* note 11, at 4.

<sup>172</sup> See John H. Blume et al., *Probing "Life Qualification" Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1231-32 (noting that "mock jury studies show that exposure to death qualification process makes a juror more likely to assume the defendant will be convicted and sentenced to death; more likely to assume that the law disapproves of persons who oppose the death penalty").

challenge than it is an inquiry—can you kill this man?<sup>173</sup> Because of the paucity of the record, one is left to speculate about a myriad of questions: would any of the members have automatically imposed the death penalty for a child rapist and therefore be excludable under *Witt* and *Morgan*; did the members think that they legally had to award the death sentence if they found Bennett guilty;<sup>174</sup> was the members' view mitigation impaired? A "yes" answer to any of these questions would have been grounds for reversal of his sentence.

### B. Case In Chief

At Bennett's court-martial, the government's case in chief was straightforward. It presented local Austrian witnesses who provided eyewitness identifications and testimonies through a translator.<sup>175</sup> The gist of their testimonies was that Bennett was seen in the area where the rape occurred, wandering around asking for a girl<sup>176</sup> (or according to some, for a woman) named Margaret or Margot.<sup>177</sup> Some identified Bennett but stated that he had a mustache at the time of the crime.<sup>178</sup> There was evidence that while Bennett had a mustache earlier in the day, he did not have the mustache a few hours afterwards.<sup>179</sup> There was some discrepancy as to whether Bennett was drunk; a few witnesses stated they could smell alcohol,<sup>180</sup> while others said they could not smell any.<sup>181</sup> One witness, however, said Bennett appeared to have a "wild angry look."<sup>182</sup>

Furthermore, there was testimony that the victim was returning home<sup>183</sup> from an errand for her parents, while Bennett was seen, at roughly the same time, leaving the victim's home walking towards the street she would need to take to come home.<sup>184</sup> One witness heard a scream coming from the area of the crime.<sup>185</sup> An American officer and his wife testified that a "little girl" came to their home pleading for help.<sup>186</sup> She was in a disheveled state, wet and dirty,

<sup>173</sup> *Id.* at 1232.

<sup>174</sup> *Id.* at 1231-37.

<sup>175</sup> Record of Trial Table of Contents at 1, United States v. Bennett, 21 C.M.R. 223 (C.M.A. 1956) (No. 7009) (on file with author).

<sup>176</sup> Record of Trial, *supra* note 11, at 70.

<sup>177</sup> *Id.* at 45, 56, 83, 88.

<sup>178</sup> *Id.* at 74, 183.

<sup>179</sup> *Id.* at 52, 59-61.

<sup>180</sup> *Id.* at 71, 75.

<sup>181</sup> *Id.* at 46-47, 53, 85.

<sup>182</sup> *Id.* at 85.

<sup>183</sup> *Id.* at 331.

<sup>184</sup> *Id.* at 107.

<sup>185</sup> *Id.* at 120.

<sup>186</sup> *Id.* at 137.

with blood on her leg.<sup>187</sup> When asked what happened, she responded, “a Negro had choked me.”<sup>188</sup> Later, while the victim was being cleaned up, she stated that the man had taken off her underwear and stuck something in her.<sup>189</sup> Additionally, the prosecution presented the testimony of two doctors—one who examined the victim at the officer’s home, and another who did so later that day at the nearby hospital.<sup>190</sup>

Lastly, the government offered into evidence a typed, signed confession from Bennett, where he admits in a rather cold manner that he had sex with the victim.<sup>191</sup> The confession stated, in part:

I walked part way into the field with her and then I carried her the rest of the way about 25 yards. She appeared as though she wanted to go with me. The reason I carried her was because we were too near the road and I wanted to go further into the field. I sat her down in the field . . . I laid down on top of her then and inserted my penis into her vagina. My penis was too big for her vagina and she started kicking. I put my hands under her buttocks and forced my penis into her vagina the rest of the way. I had intercourse with her for about 5 minutes. She screamed twice . . . I didn’t hit her, slap her or anything like that. After we started to have intercourse she tried to get up but she wasn’t strong enough . . . and I laid on top of her because I was enjoying the intercourse. *I wish to state that I did not force her at all.*<sup>192</sup>

Notably, the victim did not testify at first. In order to explain this decision, the government presented testimony from a psychiatrist that the victim should not testify owing to her current condition.<sup>193</sup>

Defense Counsel relied on a mistaken identity theory. In support, counsel cross examined the adequacy of the government witnesses’ testimony and presented a witness who testified that there was another African-American service member in the area at the time of the rape.<sup>194</sup> During closing argument, the defense focused on the inconsistencies in the witnesses’ statements as

<sup>187</sup> *Id.* at 138.

<sup>188</sup> *Id.* at 152.

<sup>189</sup> *Id.* at 153.

<sup>190</sup> *Id.* at 200-12.

<sup>191</sup> *Id.* at 221.

<sup>192</sup> Statement of John A. Bennett at 2, *Bennett*, 21 C.M.R. 223 (No. 7009) (emphasis added) (on file with author).

<sup>193</sup> Record of Trial, *supra* note 11, at 305.

<sup>194</sup> *Id.* at 289-91.

evidence of their unreliability and on how the lack of bruises on Bennett's body and penis demonstrated that he was not part of the rape.<sup>195</sup> Bennett's confession was not addressed.

Shortly after closing arguments were completed, the trial counsel made a surprise revelation.<sup>196</sup> The victim's father approached trial counsel and told him that he wanted his daughter to testify.<sup>197</sup> He was troubled that Bennett said in his confession that his daughter consented to the act, and he wanted his daughter to protect her reputation in the community.<sup>198</sup> He believed that the possibility of a not guilty verdict would be "so damaging to [his daughter's] reputation, that he would rather take the chance of her being hurt testifying rather than take the chance of the girl being hurt by a [finding of not guilty]."<sup>199</sup> Now, trial counsel wanted the victim to testify.<sup>200</sup>

Defense counsel protested and argued that he had prepared his defense with the knowledge that the victim was not going to testify, and now he was forced to defend his client under a different set of facts.<sup>201</sup> Nevertheless, defense counsel never asked for a mistrial or an order from the law officer prohibiting the victim from testifying; instead, he requested a one week continuance to interview the victim.<sup>202</sup> The law officer granted him five days.<sup>203</sup>

Five days later, prior to the victim's testimony, defense counsel raised the issue that the victim may conduct an in court identification of the accused, and he preferred that it be done by an in court line up. The court obtained three random African-American service members to be placed in a line up with Bennett and seated the four of them in the back of the court room prior to the victim's testimony.<sup>204</sup>

The victim testified through a translator and recounted the horrific events of that day.<sup>205</sup> At the end of her testimony, trial counsel moved to the subject of identifying the accused:

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<sup>195</sup> *Id.* at 318-22.

<sup>196</sup> *Id.* at 326.

<sup>197</sup> Appellate Exhibit 4 at 1, *Bennett*, 21 C.M.R. 223 (No. 7009) (on file with author).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> Appellate Exhibit 4 at 7, *Bennett*, 21 C.M.R. 223 (No. 7009) (on file with author).

<sup>201</sup> *Id.* at 2.

<sup>202</sup> *Id.* at 3.

<sup>203</sup> *Id.* at 5.

<sup>204</sup> Record of Trial, *supra* note 11, at 328.

<sup>205</sup> *Id.* at 329-35.

Q: I want you to look around the room here and take all the time you want to, and then tell me if you see that man in the room, or if you don't see him, or if you don't know?

A: There I believe.

LAW OFFICER: Have her describe the position.

A: The one who is lighter in color.

...  
Q: I am going to walk around here, and when I am standing behind him, I want you to let me know and say that I am. Is this the man?

A: No.

Q: Is it this man?

A: Yes.

TRIAL COUNSEL: Let the record show that the trial counsel is pointing to the accused.<sup>206</sup>

The defense's cross examination focused on the details of the victim's testimony on direct.<sup>207</sup> After cross examination, the government rested.<sup>208</sup> The defense had no responsive case. The law officer allowed counsel to make arguments limited to the victim's testimony;<sup>209</sup> Defense Counsel attempted to weave this closing argument into his original defense of mistaken identity.<sup>210</sup> After arguments, the law officer instructed the members and closed the court for deliberations.<sup>211</sup>

One hour later, the court-martial found PFC Bennett guilty.<sup>212</sup>

...

In many death penalty cases, the most important question is not about whether the accused is guilty, but rather, whether he should die for his crimes. Combine this with the fact that most jurors enter the sentencing phase with their minds already made up on what is an appropriate sentence,<sup>213</sup> and it is easy to see that defense counsel should attempt to prepare its defense with sentencing in mind. Oftentimes this can be done by having the accused accept partial

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<sup>206</sup> *Id.* at 334-35.

<sup>207</sup> *Id.* at 335-38.

<sup>208</sup> *Id.* at 342.

<sup>209</sup> *Id.* at 343.

<sup>210</sup> *Id.* at 343-45.

<sup>211</sup> *Id.* at 347-58.

<sup>212</sup> *Id.* at 358-59.

<sup>213</sup> See Wanda D. Foglia, *They Know Not What They Do: Unguided and Misguided Discretion in Pennsylvania Capital Cases*, 20 JUST. Q. 187, 198 (2003) (75% of all jurors with their minds made up at the beginning of sentencing did not change their mind at the end).

responsibility for the crime by pleading to a lesser offense. Conversely, a denial defense—when the evidence is strongly against the defendant—can prove disastrous during sentencing. Under those circumstances a jury is two times more likely to sentence a defendant to death.<sup>214</sup> In those cases, the members believe that the defense team “tried to fool them at first phase...and now [they are] trying to fool them again with the mitigation evidence to cheat the executioner.”<sup>215</sup>

It is easy to second guess Bennett’s counsel’s actions after the fact. The question is not whether counsel was ineffective, but rather whether the defense of mistaken identity contributed to Bennett’s death sentence. The case against Bennett seemed overwhelming. Notwithstanding the fact that the victim was never going to testify originally, which may have supported counsel’s initial defense tactic of mistaken identity, there was Bennett’s stark confession, which the defense never explained. However, once the victim testified and made an in court identification, counsel was already committed to the mistaken identity defense. So when the members went to deliberate, the mistaken identity theory by the defense could have been interpreted as Bennett’s unwillingness to take responsibility or to show any remorse for his actions. Now that a guilty verdict was returned, ripe in the members’ minds was whether he would try and fool them again at sentencing.

### C. Sentencing

At sentencing, the defense presented three members from Bennett’s unit who testified as to his good military character. They stated Bennett was an excellent worker who would uplift the morale in the unit.<sup>216</sup> Nothing further was presented.

Defense counsel’s sentencing argument was short. He brought out that under Austrian law, the maximum punishment for these crimes was twenty years.<sup>217</sup> Primarily, though, he commented on Bennett’s work performance and good military character in support of a lenient sentence:

Apparently this one particular incident, grave though it may be, has been the only time in which [Bennett] has ever conducted himself in a criminal fashion . . . . The defense has

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<sup>214</sup> See John H. Blume, Sheri Lynn Johnson & Scott E. Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035 (2008).

<sup>215</sup> *Id.* at 1045.

<sup>216</sup> Record of Trial, *supra* note 11 at 363.

<sup>217</sup> *Id.* at 372-73.

brought this out in order to soften any punishment which this court may deem him to deserve, because . . . the good which a man has done in the past must be weighed and balanced when we form an opinion of the punishment to be dealt out.<sup>218</sup>

Upon completion of argument, the law officer gave sentencing instructions, which set out the maximum punishment for rape and attempted murder.<sup>219</sup> The court then closed for deliberations on sentencing.<sup>220</sup>

Twenty five minutes later, it returned a sentence of death.<sup>221</sup>

...

The decision on whether an accused should live or die for his acts is perhaps the single most difficult choice a member must make for himself. And in making this moral decision, the member must be assisted by a well presented mitigation case by the defense. Failure to do so could mean the difference between life and death, so in capital cases the collection and presentation of mitigation evidence is the most important aspect.

Before a mitigation case can be presented, the defense must undertake a comprehensive, multi-generational investigation into the accused's background, as well as, the facts of the case. Both the *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*<sup>222</sup> and the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*<sup>223</sup> set out the minimum requirements for such an investigation. Counsel's failure to conduct a reasonably adequate mitigation investigation is ineffective, and military appellate courts have overturned death sentences for the failure to perform an adequate investigation.

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<sup>218</sup> *Id.* at 368.

<sup>219</sup> *Id.* at 369.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003) [hereinafter ABA Guidelines].

<sup>223</sup> American Bar Association, *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677 (2008) [hereinafter Supplementary Guidelines]. Under the supplementary guidelines this investigation includes: medical history; complete prenatal, pediatric and adult health information; exposure to harmful substances in utero and in the environment; substance abuse history; mental health history; history of maltreatment and neglect; trauma history; educational history; employment and training history; military experience; multi-generational history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; prior adult and juvenile correctional experience; religious, gender, sexual orientation, ethnic, racial, cultural and community influences; socio-economic, historical, and political factors. *Id.* at 682.

The cases of *United States v. Curtis*,<sup>224</sup> *United States v. Murphy*,<sup>225</sup> and *United States v. Kreutzer*,<sup>226</sup> were all overturned because of deficiencies in the mitigation investigation. Each case involves brutal and heinous acts of violence—Curtis stabbed and killed his officer in charge and his wife, fondling her genitalia before she died;<sup>227</sup> Murphy killed his wife and two children;<sup>228</sup> and Kreutzer opened fire on his brigade, killing an officer and wounding at least eighteen more soldiers.<sup>229</sup> Each case provides separate pictures of why counsel's performance in mitigation was so egregious, but there are noteworthy common facts between them: none of the accused had the assistance of a mitigation specialist at trial; the defects in mitigation were proven post-trial through the efforts of appellate counsel; and, the sentences were all overturned because the courts were no longer confident in the reliability of the results.<sup>230</sup>

The appellate history of *United States v. Curtis*<sup>231</sup> is long,<sup>232</sup> having undergone a number of reviews; however, Curtis's death sentence was ultimately overturned because counsel did not fully explore the available mitigation evidence. Particularly, counsel did not explore evidence of Curtis's intoxication during the time of the offense, nor did it explore a finding from a sanity board that "it is doubtful that the event would have happened without the use of alcohol."<sup>233</sup> At the time, Judge Gierke recognized that the Curtis case was not about whether he did it, but about why he did it, and it was "the defense team's job to provide an explanation sufficient to win one vote for life."<sup>234</sup> Given the importance that Curtis's intoxication may have had on the issue of life or death, defense counsel's failure to present such evidence in sentencing or, at

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<sup>224</sup> 44 M.J. 106 (C.A.A.F. 1996) (affirming the findings and sentence of death); *United States v. Curtis*, 46 M.J. 129 (C.A.A.F. 1997) (granting appellant's petition for reconsideration and setting aside the death sentence based on ineffective assistance of counsel claims); *United States v. Curtis*, 48 M.J. 331 (C.A.A.F. 1997) (denying the government's petition to reconsider the court's prior ruling to set aside the sentence); *United States v. Curtis*, 52 M.J. 166 (C.A.A.F. 1999) (affirming the lower court's decision to reassess appellant's sentence to life).

<sup>225</sup> 50 M.J. 4 (C.A.A.F. 1998).

<sup>226</sup> 59 M.J. 773 (A. Ct. Crim. App. 2004).

<sup>227</sup> *Curtis*, 44 M.J. at 117-18.

<sup>228</sup> *Murphy*, 50 M.J. at 4-5.

<sup>229</sup> *Kreutzer*, 59 M.J. at 774-75.

<sup>230</sup> *Curtis*, 44 M.J. at 171; *Murphy*, 50 M.J. at 15-16; *Kreutzer*, 59 M.J. at 784.

<sup>231</sup> *Curtis*, 44 M.J. at 171.

<sup>232</sup> See Mary M. Foreman, *Military Capital Litigation: Meeting the Heightened Standards of United States v. Curtis*, 174 MIL. L. REV. 1 (2002) (general discussion of how the *Curtis* case impacted defense counsel's representation in capital cases).

<sup>233</sup> *Curtis*, 44 M.J. at 172 (Gierke, J., concurring in part dissenting in part) (quoting sanity board report).

<sup>234</sup> *Id.* at 171.

the very least, provide a justifiable reason for not doing so, undermined the results.<sup>235</sup>

In a subsequent opinion, Chief Judge Cox, recognizing the importance that mitigation plays in capturing the vote of one member, wrote:

appellant's sentencing case was not fully developed because trial defense counsel lacked the necessary training and skills to know how to defend a death-penalty case or where to look for the type of mitigating evidence that would convince at least one court member that appellant should not be executed.<sup>236</sup>

Chief Judge Cox also recognized that despite the atrociousness of the crime, there is always a distinct possibility that a member may still vote for life, and that there is no such thing as an automatic death case.<sup>237</sup> Accordingly, in order to ensure that a service member's trial is fair and reliable, it is imperative that the accused be represented by experienced counsel who can present a thorough and complete mitigation case.<sup>238</sup>

One year after *Curtis* was decided, the CAAF issued its opinion in *United States v. Murphy*.<sup>239</sup> In *Murphy*, the CAAF summed up counsel's errors thusly: "SGT Murphy was defended by two attorneys who were neither educated nor experienced in defending capital cases, and they were not provided the resources or expertise to enable them to overcome these deficiencies, or they did not request same."<sup>240</sup> They did not seek to interview potential mitigation witnesses in person;<sup>241</sup> instead, they "attempted to develop an extenuation and mitigation case by correspondence and telephone."<sup>242</sup> At sentencing, counsel based their case on the fact that he was not a violent man, his good military character, and his desire to amend his life.<sup>243</sup> On appeal, appellate counsel obtained the assistance of mitigation and medical specialists to complete a

<sup>235</sup> *Id.* at 171-72.

<sup>236</sup> *Curtis*, 48 M.J. at 332-33 (Cox, C.J., concurring).

<sup>237</sup> *Id.* at 332.

<sup>238</sup> *Id.* Chief Judge Cox set out three specific requirements for a capital case: "1. Each military service member has available a skilled, trained, and experienced attorney; 2. All the procedural safeguards prescribed by law and the Manual for Courts-Martial have been followed; and, 3. Each military member gets full and fair consideration of all pertinent evidence, not only as to findings but also as to sentence." *Id.*

<sup>239</sup> 50 M.J. 4 (C.A.A.F. 1998).

<sup>240</sup> *Id.* at 9.

<sup>241</sup> Supplementary Guidelines, *supra* note 223, at 689 ( requiring counsel to conduct face-to-face interviews).

<sup>242</sup> *Murphy*, 50 M.J. at 12.

<sup>243</sup> *Id.* at 13.

thorough investigation.<sup>244</sup> They discovered that Sgt Murphy suffered from severe mental illness, may have had organic brain damage, and may not have been able to form the requisite intent for the crime.<sup>245</sup> Because of this new information and trial defense counsel's failure to investigate and present any of it, the CAAF held that Murphy did not get a full and fair sentencing hearing.<sup>246</sup>

In *United States v. Kreutzer*,<sup>247</sup> trial defense counsel asked for the assistance of a mitigation specialist, but the military judge denied this request.<sup>248</sup> The Army Court of Criminal Appeals found that the denial constituted reversible error, but went further to hold that defense counsel's mitigation investigation was also ineffective.<sup>249</sup> The court found that "counsel failed to discover and investigate sufficiently the full range of available evidence, both psychiatric and other mitigation evidence, so that they could make reasonable choices and a comprehensive presentation."<sup>250</sup> Notably, counsel failed to explore the wealth of psychiatric evidence in the case: They did not interview a key psychologist who had spent a considerable amount of time with the accused, they failed to discover a favorable report written by their own team of experts, and they did not present the testimony of the mental health providers who knew the most about the accused.<sup>251</sup> Had counsel discovered this information and presented a complete mitigation case, the results of the trial could have been different.<sup>252</sup>

These three cases along with the ABA Guidelines and the Supplementary Guidelines demonstrate the importance that mitigation plays in a death case. They also outline counsel's present day responsibilities in collecting and presenting mitigation evidence. In the military, the fact that mitigation now plays a specific role in the sentencing scheme under RCM 1004<sup>253</sup> underscores the importance for counsel to fully develop this area. Namely, under RCM 1004, in order to award a death sentence the members must unanimously find, that the mitigating circumstances are substantially outweighed by the aggravating circumstances.<sup>254</sup> In presenting mitigation evidence, the defense

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<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 13-14.

<sup>246</sup> *Id.*

<sup>247</sup> 59 M.J. 773 (A. Ct. Crim. App. 2004).

<sup>248</sup> *Id.* at 775-76.

<sup>249</sup> *Id.* at 780.

<sup>250</sup> *Id.* at 783.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 784.

<sup>253</sup> MCM, *supra* note 19, R.C.M. 1004.

<sup>254</sup> *Id.*

“shall be given broad latitude to present evidence in extenuation and mitigation.”<sup>255</sup>

RCM 1004 did not exist at the time of Bennett’s court-martial, and the role and importance of mitigation was not yet developed. Instead, the members had the unguided discretion<sup>256</sup> to award the death sentence, and the accused was oftentimes only left with a hollow appeal for mercy or good military character evidence as the sole basis not to award a death sentence. One fact that was true for Bennett’s case that is true now is that the members had to unanimously agree that death was the appropriate punishment.<sup>257</sup> Thus, Bennett’s fate could have been changed with the vote of one member.

Fresh in each of the members’ minds at the start of Bennett’s sentencing, however, was the testimony of the eleven year old victim retelling the horrific events that occurred to her; the testimony from a doctor and a medical report of her injuries; Bennett’s cold confession; and the defense’s theory of mistaken identity. Simply put, the members were presented with a picture of a callous person who intentionally committed an unspeakable act against an innocent girl without displaying any remorse for his actions.

Facing this, the defense’s task was to come up with a compelling reason why Bennett should live. In response, the defense presented three witnesses who testified about Bennett’s good military character—and nothing else.<sup>258</sup> Under today’s standards, this sentencing case was woefully inadequate. It may be adequate when the members are deciding whether to award a punitive discharge, but when the question is whether an accused should die for his atrocious acts, evidence that he was a good truck driver—by itself—hardly presents a compelling reason to choose life. In this case, more evidence should have been presented.

For instance, the results of Bennett’s IQ tests were part of his initial competency examination done on 30 December 1954, prior to his court-martial, and may have provided a better picture of the accused’s capabilities.<sup>259</sup> Further, evidence that Bennett suffered from seizures was made known during this same time.<sup>260</sup> Granted, Bennett underwent many medical examinations during and after his court-martial, but the pivotal question in those examinations was on his

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<sup>255</sup> *Id.*

<sup>256</sup> See United States v. Matthews, 16 M.J. 354, 378-79 (C.M.A. 1983).

<sup>257</sup> UCMJ art. 52 (2012).

<sup>258</sup> Record of Trial, *supra* note 11, at 362-67.

<sup>259</sup> Request for Further Psychiatric Examination and Motion for Enlargement of Time, *supra* note 108, at 1.

<sup>260</sup> *Id.* at 2.

mental competency and not on mitigation.<sup>261</sup> Today, however, this information would be seen as mitigating and would compel counsel to investigate further to determine whether the accused was mentally retarded or had organic brain damage.

Bennett's low intelligence is itself mitigating. The Supreme Court in *Tennard v. Dretke*<sup>262</sup> noted that borderline intellectual functioning is inherently mitigating. One study highlighted that evidence of mental illness is mitigating to at least half of the jurors studied.<sup>263</sup> Also, evidence that the accused was mentally impaired when he committed the crime can likely decrease the member's views about the vileness of the crime.<sup>264</sup> Although it may not have been a winning defense at findings, it does provide a partial answer to Judge Gierke's salient question in *Curtis* of: Why did the accused do it? By presuming that Bennett was of low intelligence, you get a different perspective on even the most egregious aspects of the crime, i.e. that his stark and cold confession can be seen as a product of a juvenile mind.

The evidence that Bennett suffered from seizures is also mitigating, a fact that was recognized by members of the USDB medical board when they recommended that his sentence be commuted to life imprisonment.<sup>265</sup> Although the board opined that Bennett was not sane during the time of the offense, the real basis of the board's opinion was intended to be a plea for clemency based on the "medical possibility that Bennett was under epileptic seizures when the offenses were committed."<sup>266</sup> However, because they were limited to the question about sanity, they attempted to fit their plea for clemency into their findings.<sup>267</sup>

Interestingly, on appeal, the Army Board of Review looked into the appropriateness of Bennett's sentence.<sup>268</sup> In deciding this issue, the court examined Bennett's age, his low intelligence, his good military character, evidence of his intoxication at the time of the offense, the maximum sentence for rape in Austria and letters of clemency submitted on his behalf.<sup>269</sup> The court

<sup>261</sup> *Id.*

<sup>262</sup> 542 U.S. 274, 287 (2004).

<sup>263</sup> Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1542 (1988).

<sup>264</sup> See Blume, et. al., *supra* note 214, at 1046.

<sup>265</sup> Memorandum for Chief, Military Justice Division, Subject: District Court hearing in PFC John A. Bennett case at 2, United States v. Bennett, 21 C.M.R. 233 (C.M.A. 1956) (No. 7009) (on file with author).

<sup>266</sup> *Id.*

<sup>267</sup> Letter to President from Secretary of the Army, Petition for Clemency, *Bennett*, 21 C.M.R. 223 (No. 7009) (on file with author).

<sup>268</sup> Opinion Army Board of Review at 9, *Bennett*, 21 C.M.R. 223 (No. 7009) (on file with author).

<sup>269</sup> *Id.*

held that “all of these matters, in a proper case, might furnish an appropriate basis for clemency. However, we do not believe this is such a case.”<sup>270</sup>

Some may argue that given the Army Board’s opinion, Bennett’s sentence would be the same, even if the members heard the mitigation evidence. However, an appellate court’s review under Article 66, UCMJ,<sup>271</sup> in a capital case for sentence appropriateness is different than the individualized reasoned moral choice that a member must make at a court-martial.<sup>272</sup> The fact that a three-judge panel did not find the mitigation evidence convincing does not mean that all the members at Bennett’s court-martial would feel the same. It only takes one vote to undermine a death sentence. Although one member may discard a fact as non-mitigating, another may find it to be the sole basis for a life sentence. Here, the important question is: Would a thorough presentation of mitigation evidence have changed one vote? In other words, would a reasonable finder of fact, armed with this additional evidence, come to the same decision?

Under today’s standards, Bennett’s counsel failed to explore many relevant avenues of mitigation.<sup>273</sup> For instance, Bennett’s life history was never developed or presented to the members. Because counsel did not make reasonable efforts to present a mitigation case, the members had no real reason to spare Bennett’s life. And as in *Curtis, Murphy* and *Kreutzer* the lack of a reasonable investigation into mitigation should call into question the reliability of Bennett’s sentence.

#### **IV. The Appellate Process: Death is Different**

Seldom, if ever, have we been faced with a record which revealed a more vicious offense, or an accused who had less to entitle him to any consideration by the fact finders.

—*United States v. Bennett*<sup>274</sup>

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<sup>270</sup> *Id.*

<sup>271</sup> UCMJ art 66 (2012).

<sup>272</sup> See, e.g., *United States v. Curtis*, 32 M.J. 252, 271 (1991) (“before a death sentence adjudged by a court-martial can be approved, the Court of Military Review must determine: (a) whether one or more valid aggravating factors have been unanimously found by the court-martial and this finding is factually and legally correct; (b) if any corrective action results in setting aside any such finding but leaves intact at least one “aggravating factor,” whether this error affected imposition of the sentence; (c) whether the death sentence adjudged is proportionate to other death sentences that have been imposed; and (d) whether under all of the facts and circumstances of the case the death sentence is appropriate, Art. 66(c).”)

<sup>273</sup> See ABA Guidelines, *supra* note 222.

<sup>274</sup> 21 C.M.R. at 225.

Six months after Bennett's court-martial, the Army Board of Review examined the record of trial and affirmed the findings and sentence.<sup>275</sup> Less than one year later, the Court of Military Appeals (CMA) affirmed the Board's decision.<sup>276</sup> Bennett's appellate counsel raised six assignments of error, to include the admissibility of his statements and sentence appropriateness. Like his court-martial, Bennett's appeal was completed faster than a capital case would be today. Presently, a capital case takes on average eight years to undergo appellate review;<sup>277</sup> Bennett's case completed direct appellate review in only eighteen months. Also, the number of errors raised by Bennett's counsel is far fewer than what would be raised today. For instance, in *United States v. Walker*,<sup>278</sup> the defense raised over 158 issues, while Bennett's counsel raised only six. One reason for the immense volume is that the law in death penalty cases is constantly developing and what may be meritless at one time may prove to be meritorious later.<sup>279</sup>

Missing, however, from the six assignments of error was a claim of ineffective assistance of counsel. But the Court of Military Appeals did *sua sponte* comment on defense counsel's performance at trial and specifically commended his advocacy:

We have searched the record for other possible errors or defense, particularly those touching upon mental responsibility, but we have found nothing which justifies discussion. In that connection, we feel we should comment on the high level of professional competence found within this record. Defense counsel..defended with vigor and fidelity what was clearly a very difficult case. He conceded nothing, explored everything, was fully prepared on each issue, and made the most of what he had.<sup>280</sup>

Bennett did eventually challenge his counsel's competency in a habeas petition filed a few years later.<sup>281</sup> However, both the district court and the court

<sup>275</sup> Opinion Army Board of Review, United States v. Bennett, 21 C.M.R. 223 (C.M.A. 1956) (No. 7009) (on file with author).

<sup>276</sup> *Bennett*, 21 C.M.R. at 227.

<sup>277</sup> Dwight Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 MIL. L. REV. 1, 41 (Fall 2006).

<sup>278</sup> 66 M.J. 721 (N.M. Ct. Crim. App. 2008).

<sup>279</sup> See Andrea D. Lyon, *Defending the Life-or-Death Case*, THE AM. BAR ASS'N, LITIGATION, Vol. 32, No. 2 at 48 (Winter 2006) (citing the petitioner's effort in *Morgan v. Illinois*, 504 U.S. 719 (1992), to preserve the issue on the exclusion of jurors who could not consider anything but a death sentence as evidence of such an instance).

<sup>280</sup> *Id.*

<sup>281</sup> *Bennett v. Davis*, 267 F.2d 15, 17 (10th Cir. Kan. 1959).

of appeals concluded that because Bennett had not raised this issue during the normal course of appeal, he was precluded from doing so in his current petition.<sup>282</sup> Furthermore, both courts highlighted the CMA's comment as proof that Bennett was adequately represented.<sup>283</sup>

The CMA's approval of Bennett's case stands in stark contrast with its reversal of a death case one year prior to Bennett's review. In *United States v. Parker*,<sup>284</sup> the appellant was convicted of raping two German women and sentenced to death. In a 2-to-1 decision, the court reversed the findings and sentence because the cumulative errors in the case resulted in an unfair and unjust proceeding.<sup>285</sup> Principal among those errors was counsel's deficient performance.<sup>286</sup> In reviewing this issue, the court relied on a different standard for ineffectiveness than the one used today under *Strickland v. Washington*.<sup>287</sup> Prior to *Strickland*, the court looked to whether an appellant could "reasonably show that the proceedings . . . were so erroneous as to constitute a ridiculous and empty gesture, or were so tainted with negligence or wrongful motives on the part of his counsel as to manifest a complete absence of judicial character."<sup>288</sup>

In *Parker*, the court commented on counsel's lack of preparation displayed by his uninformed cross-examination and dearth of questions on voir dire.<sup>289</sup> Interestingly, the court found that the most critical failure by counsel was "the lack of any attempt to avoid a death penalty."<sup>290</sup> The appellant had a clear record, "yet not one word was offered, sworn or unsworn, in extenuation and mitigation."<sup>291</sup> Further, the court highlighted the SJA's recommendation for clemency where he listed a number of mitigating factors that favor clemency, such as the appellant's low IQ, the lack of lasting physical harm to the victims, a psychiatric report, and the lack of unusual violence and terror in the crime.<sup>292</sup> The court cited this recommendation as proof that defense counsel could have and should have presented mitigation evidence: "Those reasons, plus additional information obtained by deposition, if available, might have been given to the

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> 19 C.M.R. 201, 211 (C.M.A. 1955).

<sup>285</sup> *Id.* at 207.

<sup>286</sup> *Id.* at 205-12.

<sup>287</sup> 466 U.S. 668, 687 (1984). Under *Strickland* the test for ineffective assistance of counsel is (1) whether counsel's performance was so deficient that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment and (2) whether the deficient performance prejudiced the accused. *Id.* at 687.

<sup>288</sup> *Parker*, 19 C.M.R. at 211.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 212.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* at 213.

court-martial to consider when it was presented with the task of determining an appropriate sentence, but the short answer is they were not.”<sup>293</sup>

So why did Bennett’s case withstand appellate review, but not Parker’s? Specifically, why did Bennett’s counsel’s performance deserve a *sua sponte* outburst of accolades from the court, while Parker’s counsel’s performance was branded a “ridiculous and empty gesture”?<sup>294</sup> Given the above test, it is clear why the court believed that Parker’s counsel’s failure to mount any evidence at findings and sentencing was an empty gesture.<sup>295</sup> With Bennett’s case, the difference is in degree: Bennett’s counsel was more than a potted plant. He asked questions on voir dire. He mounted a defense—cross examined the government’s witnesses and presented his own. At sentencing, he called three witnesses to testify about Bennett’s work performance in the Army.<sup>296</sup>

In the modern era of military death penalty cases, the appellate courts have overturned nine out of the last eleven cases to go through direct review.<sup>297</sup> These reversals underscore the fact that appellate courts will review death penalty cases with a more demanding scrutiny. To the courts, death is different, and the fundamental inquiry is whether the results of the trial are indeed reliable.<sup>298</sup> At times this intense scrutiny has resulted in the overturning of cases that would normally be upheld had they been non-capital cases.<sup>299</sup> Also, the courts have incrementally placed additional burdens on defense counsel’s performance in capital cases. As noted earlier, three of the cases—*Curtis*,

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 211.

<sup>295</sup> See also *United States v. McMahan*, 21 C.M.R. 31, 44 (C.M.A. 1956). A capital case deriving from the same command as the *Parker* case; the court found that defense counsel was ineffective for failing to offer any sentencing evidence or an argument for an appropriate sentence. During sentencing, counsel’s sole statement to the members was “We have nothing further.”

<sup>296</sup> See *supra* Part III.B-C (describing counsel’s performance during the findings and sentencing portion of the case).

<sup>297</sup> See *United States v. Dock*, 35 M.J. 627 (A.C.M.R. 1992); *United States v. Murphy*, 50 M.J. 4 (C.A.A.F. 1998); *United States v. Thomas*, 46 M.J. 311 (C.A.A.F. 1997); *United States v. Simoy*, 50 M.J. 1 (C.A.A.F. 1998); *United States v. Curtis*, 46 M.J. 129 (C.A.A.F. 1997); *United States v. Kreutzer*, 59 M.J. 773 (A. Ct. Crim. App. 2004); *United States v. Quintanilla*, 60 M.J. 852 (N-M. Ct. Crim. App. 2005); *United States v. Walker*, 66 M.J. 721 (N-M. Ct. Crim. App. 2008); *United States v. Parker*, 71 M.J. 594 (N-M. Ct. Crim. App. 2012).

<sup>298</sup> See, e.g., *Walker*, 66 M.J. at 732 (“The reliability of the result trumps all other concerns in death-penalty cases and the appellate courts are called upon to ensure that the adversarial system has functioned properly.”)

<sup>299</sup> See *Sullivan*, *supra* note 277, at 49 (Highlighting that the cases of *United States v. Thomas*, 46 M.J. 311 (1997) and *United States v. Simoy*, 50 M.J. 1 (1998), were reversed because the military judge instructed the members to vote on the death sentence first, as opposed to what was required—voting from lightest sentence to the most severe); but see *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986) (holding an error similar to that in *Simoy* but in a non-capital case, did not result in reversible error).

*Murphy* and *Kreutzer*—were overturned due to the poor performance by counsel during the mitigation investigation.<sup>300</sup> Furthermore, the courts have recognized the importance that one vote plays in a death case. In *United States v. Quintanilla*,<sup>301</sup> the Court of Appeals for the Armed Forces affirmed the lower court’s reversal of the appellant’s death sentence due to the military judge’s improper granting of the government’s challenge for cause of one member.<sup>302</sup>

Under today’s standards, Bennett’s sentence may likely have been reversed on appeal. Putting aside the basic constitutional questions about members’ unguided discretion and the death sentence for rape, it is clear that Bennett’s counsel’s performance did not meet today’s standard for the defense of a capital case. He did not perform an adequate voir dire to ascertain whether the members had any absolutist views on the death penalty. But more importantly, he did not investigate or present the wealth of mitigation evidence in the case. This is not an indictment of counsel, since he can only be measured by the standards of the time. Instead, it is recognition of our changing expectation for capital cases; and a realization that what was once an acceptable standard would no longer be accepted today.

## V. Conclusion

During the course of writing this article, the question came up of whether Bennett’s case, if tried at a state court at the time, would have been handled any differently. Given the time period and the infancy of death penalty representation, it is likely that the answer would be no. It is likely that each jurisdiction can look back fifty years and discover its own Private Bennett, whether state or federal. But Bennett’s case is relevant for the military precisely because he was part of the military—warts and all. He was represented, sentenced and executed within the military justice system. He is part of our history. As part of our history, he has the distinction of being the last person executed. And in many respects, this makes his case the starting point for any discussion on the modern day capital court-martial.

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<sup>300</sup> *United States v. Curtis*, 44 M.J. 106 (C.A.A.F. 1996); *United States v. Murphy*, 44 M.J. 106 (C.A.A.F. 1996); *United States v. Kreutzer*, 44 M.J. 106 (C.A.A.F. 1996).

<sup>301</sup> 63 M.J. 29 (C.A.A.F. 2006).

<sup>302</sup> *Id.*

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